Nos. 77-83

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. GRIMSDELL, DOING BUSINESS AS GROCER PRINTING COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

THE GALIGHER COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

GRAY-CANNON LUMBER COMPANY

BRIEF OF RESPONDENTS

SHIRLEY P. JONES,
BENJAMIN L. RICH,
GORDON R. STRONG,

Boston Building
Salt Lake City, Utah

CHARLES D. MOORE,

Felt Building
Salt Lake City, Utah

Attorneys for Respondents.

INDEX

CITATIONS

Cases (continued): PAGE

In the Supreme Court of the United States

NOS. 77-83

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER
v.
PETTY MOTOR COMPANY

UNITED STATES OF AMERICA, PETITIONER
v.
MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL COMPANY

UNITED STATES OF AMERICA, PETITIONER
v.
WILLIAM G. GRIMSDELL, DOING BUSINESS AS GROCER PRINTING COMPANY

UNITED STATES OF AMERICA, PETITIONER
v.
CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT COMPANY

UNITED STATES OF AMERICA, PETITIONER
v.
INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA, PETITIONER
v.
THE GALIGHER COMPANY

UNITED STATES OF AMERICA, PETITIONER
v.
GRAY-CANNON LUMBER COMPANY

BRIEF OF RESPONDENTS

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 621-624) is reported in ~~1942~~ 147 F. (2d) 912.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 5, 1945 (R. 625-626), and petition for certiorari was filed in this Court May 15, 1945. The peti-

tioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. Respondents assert that there is no impelling reason for a review of the judgments of the Circuit Court of Appeals, particularly in view of Rule 38, Paragraph 5(b), of the rules of this Court and title 28, Section 391 U. S. C. A. (Judicial Code, Section 269, amended.)

QUESTIONS PRESENTED

The petitioner (hereinafter referred to as the Government) presents two questions as follows: (Page 2, Governments Brief)

> "1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than the tenants' existing leases are entitled to prove moving costs and consequential damages resulting from the enforced removal as evidence of the value of their interests.
>
> "2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property."

These questions will be considered specifically when we discuss the Government's brief. At the moment, however, we make this comment:

The first question presents matters that are not present in any of these cases. The United States condemned no property for a temporary use for a period longer than any of the existing leases and no tenant endeavored or was permitted to prove consequential damages as evidence of the value of its interests.

The second question likewise presents no problem involved in these cases. There was no effort to award and

no award was made of compensation to any tenant based upon any indefinite period of time the jury should conclude the tenant might have continued to occupy the property. The jury were told to find the present value of the tenants' occupancy and to award compensation based upon that value. The verdicts of the jury do not contain any compensation for any consequential damages or for any indefinite considerations.

Our argument in favor of sustaining the judgment of the Circuit Court will be presented under four propositions:

(I) The substantial rights of the Government have not been affected by the judgments herein, nor is the Government in any position to make complaint here against either of the lower courts.

(II) The respondents' tenancies, whether month to month or otherwise, gave them the right to occupy their premises which were their business homes, and such tenancies and right of occupation were property.

(III) Respondents' property was taken for public use.

(IV) For their property taken by the Government for public use the respondents are entitled to just compensation —the value of their tenancies or rights of occupation at the time they were taken. Market value and just compensation are not always synonymous, particularly in determining the value of leases. Evidence admitted in these cases is relevant in determining just compensation, even upon the "market value" basis. The verdicts for the tenants are not more than they were entitled to under the Fifth Amendment.

We shall discuss the Government's "Questions Presented" and its argument later in this brief after we have presented to the Court our discussion of the four fore-

going propositions presented in favor of sustaining the judgment of the Circuit Court.

STATEMENT

The Government's statement is inadequate and in some particulars inaccurate. It does not give this Court a true or complete picture of the cases and make assumptions not present. The circumstances in these cases are unusual and unique, and proper consideration of them requires an adequate statement of the factual background. Attempting to reconstruct the Government's statement and correct inaccuracies therein so as to make it complete would be unsatisfactory and would not save either time or space. We, therefore, take the liberty of making our own statement.

Preliminary to making our own statement may we note that on Page 3 of the Government's brief it is recited that the Court granted the Government exclusive possession and "by consent fixed a series of dates" for the tenants to vacate. The impression should be corrected at the outset that the tenants consented to their ouster from their premises. Exactly the contrary is true. The tenants were required on one day's notice to appear and show cause why they should not be ousted forthwith and the dates of their removal were the latest dates to which the Government would consent. Believing that great urgency existed for the need of their premises the tenants did exercise the utmost diligence in tearing up their establishments regardless of personal loss, but none of them agreed to move or would have moved had they not been compelled to do so by these proceedings. When the Government stated in Court that the tenants were "given" until certain dates to vacate, the Court immediately corrected this statement as follows: "No, I didn't give it to them. It was agreed to by the Government agents." (R. 153). We never had any voice

in whether or not we would move or the date when we should move. We were given no consideration whatsoever at any time from the beginning until the present moment.

Among other inaccuracies in the Government's statement, we note on Page 4 of its brief it is stated, "The tenants' claims for compensation were based principally upon expenditures incurred in moving out of the Old Terminal Building," etc. Not only was no evidence submitted for the purpose of recovering such expenditures, but the Court expressly instructed the jury that such items did not constitute just compensation. All the evidence was directed only towards determining the value of the tenants' right of occupation of their premises.

On Page 5 of its brief, the Government asserts that at the trial it contended, "that the only issue between the United States and the various defendants, including the owner and the tenants, was the fair rental value of the entire building for the period taken and that the apportionment and distribution of the sum thus determined was a matter to be worked out between the landlord and the tenants," citing *Carlock v. United States*, 53 Fed. 2d, 926, 927. This statement we shall advert to later in view of what actually happened below and the present position assumed by the Government on that point. We shall also point out that Carlock v. United States is an authority against the Government under the facts herein, and also why the Government itself made it impossible for the lower court to adopt the Government's contention.

On Page 6 of its brief, the Government gives the impression that all of the tenants attempted to plead loss of profits in their answers. Only the Gray-Cannon Lumber Company and Petty Motor Company answers contained any such allegations and at no time was any evidence received or considered relative to loss of profits.

On Page 8 of its brief, the Government's summary of the Court's instructions is so incomplete as to convey a meaning entirely different than that actually announced by the trial court.

The foregoing matters are but illustrative of the necessity of making a complete statement which we shall now attempt to do.

The Old Terminal Building in Salt Lake City is partly shown in Exhibit 5 (R. 579). (The Exhibit was received for the purpose of showing the Galigher Company sign) (R. 248). The building extends almost to the higher building shown in the right-hand portion of the Exhibit (the Dooly Block mentioned in the record as the former location of the Post Office and Federal Court) (R. 490-491). The Old Terminal Building is in the center of the mining-machinery district in Salt Lake City and especially desirable for the purposes of respondents, its former tenants, which desirability was lost by their removal (R. 187-190, 226-227, 249-252). In the record are included Government's Exhibits A to N, inclusive (R. 595-619). After offering and having these exhibits received in evidence, the Government made no further reference to them at the trial, in the Circuit Court, or here. There was no justification for such exhibits in this case, since none of them portray any of the tenant's premises (R. 370), and are the worst looking pictures that could be made of the unoccupied portions of the building (R. 370). Most of them were taken either after the Government moved in and commenced renovations or after Mr. Richards took possession and started making repairs (R. 349, 351, 352).

On November 9, 1942, the Government filed a petition for condemnation (R. 3-5). The title to the proceedings indicates that they were to acquire 7/10ths of an acre of land,

whereas no effort was made to acquire the title or fee to any land. The action was brought under authority of the Second War Powers Act (Appendix, page 42, Government's brief), of March 27, 1942, 56 Stat. 177, C. 199, Sec. 201 (50 U. S. C. A. App., Supp. 3, Section 632). Under this Act, the Secretary of War was authorized "to acquire by condemnation, any real property, temporary use thereof, or other interests therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes." The petition recites that the Secretary of War requested the Attorney General to institute this action for the purpose of acquiring the real property involved in this action, including the building thereon, known as the Old Terminal Building, to be used to house the offices of the Pacific Division of the Army Engineers, but later in Paragraphs 3 and 4 of the petition it appears that what is actually sought by the proceedings is a lease of the building expiring June 30, 1945, or at the election of the Government, June 30, 1943. Actually then, the condemnations proceedings sought only the immediate possession and the temporary use of the Terminal Building for a period of approximately seven and one-half months, with renewal privileges at the option of the Government.

All of the respondents were made parties to the proceedings under the allegation that they were tenants and interested parties (Paragraph 3). The building was owned by W. B. Richards, Jr., who had purchased it in October, 1942 (R. 179, 211), and it was partly vacant (R. 353), the respondents being the tenants of the occupied portions (R. 3-5). The Utah statute governing parties defendant in condemnation proceedings, Sec. 104-61-8, Utah Code Annotated, 1943, provides:

> "All persons in occupation of, or having or claiming an interest in, any of the property described in the

> complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in the same manner as if named in the complaint."

Thus under the Utah statutes, even persons merely in occupation, as well as persons having other interests in the property, may appear and present their interests separately. The Government made each of the respondents a party upon the allegation that they were tenants and parties in interest in the proceedings.

At the time these proceedings were instituted some of the tenants had been in possession under four different owners (R. 218), and all of them under owners other than Mr. Richards. Mr. Richards desired all of the tenants to stay on and they were all satisfactory to him. None of the tenants desired to move or intended to move (R. 109). At the time these proceedings were instituted there was a definite shortage in Salt Lake City of available business space (R. 275). This appears also from the testimony of each tenant and each expert of both the Government and the tenants.

The Grocer Printing Company (Mr. Grimsdell) had occupied its premises in the Terminal Building for twenty-six years as a printing establishment (R. 155-156), twenty-one years of which were without any written lease (R. 161). At the time of its ouster it had twelve employees, was doing an annual volume of business of $60,000.00 (R. 162), had to remove heavy presses and machinery weighing approximately sixty thousand pounds, most of which were accommodated in the Terminal Building by special supports installed by the tenant, was compelled to sign a 5-year lease for new quarters at greatly advanced rental, in addition to paying heavy moving and other expenses made necessary

by the ouster totaling actual out-of-pocket expense and damage in the total sum of $9,741.34 (Summary R. 184-186). The value of this occupancy at that date was testified to be $12,500.00 (R. 293). The jury allowed $3,000.00 (R. 58).

The Chicago Flexible Shaft Company (Mr. Wiggs) had occupied its premises in the Terminal Building without a written lease for twenty-six years. Both it and the Grocer Printing Company had been under four different landlords (R. 218); at the time of the ouster was doing between $200,000.00 and $250,000.00 worth of business a year at those premises; had a $50,000.00 stock which had to be moved; employed seven people (R. 217); was compelled to pay a $500.00 bonus for a lease (R. 223), entering into a written lease at an advanced rental and heavy moving and renovation expenses in a less desirable location, all as a result of these proceedings. The total out-of-pocket expense of this company was $3,414.75 (R. 230). The value of its occupancy was $4,500.00 (R. 294). The jury allowed it $1,800.00 (R. 64).

The Galigher Company had been in its premises in the Terminal Building without a written lease for eighteen years (R. 245). At the time of the ouster it was doing a business totaling a million dollars a year. It had forty-four employees. Its premises were specially fitted and constructed for its business, which is international in its scope, and for approximately eight years all of its national advertising had been identified with a picture of its location in the Terminal Building (R. 246-249). It also had heavy expenses and increased rent to pay because of the taking of its premises (R. 268-269). Its out-of-pocket expense was $4,949.15 (R. 269). Its occupancy was worth $7,500.00 (R. 294). The jury allowed it $2,500.00 (R. 54).

The Independent Pneumatic Tool Company had been in its premises under a written lease for a term from October 24, 1939, to November 30, 1942, which was renewed in August of 1942, for an additional term of five years (R. 190). The Government contended that this company had no lease at the time of its eviction (R. 485-487), but now argues in its brief that this tenant has no right to any compensation because of this provision in the lease, which it formerly contended did not exist: "If the whole or any part of the demised premises shall be taken by Federal, State, county, city or other authority for pubic use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the lease." (R. 202). The order of possession required this tenant to vacate November 17, 1942 (R. 7). The Government now apparently concedes that despite this provision, the Government is primarily liable to the tenant (Government's Brief, page 12; on Petition for Certiorari and pp. 26, 27, last brief). This lease will be discussed later in considering the Government's argument. This company at the time of its ouster employed eight persons and was doing an annual business of $140,000.00 (R. 190-192). It likewise had to enter into a written lease for five years at increased rent in a less desirable location (R. 195), in addition to paying and incurring expenses, all caused solely by these proceedings in the sum of $1,584.31 (R. 198). The value of its occupancy was $3,500.00 (R. 293). The jury allowed it $600.00 (R. 56).

The Gray-Cannon Lumber Company had been in possession of its premises under a written lease from August,

1938, until August, 1941. A new lease was drawn up for an additional three years which had not been signed at the suggestion of the landlord's agent in order to get the premises fixed up before the lease was signed (R. 323). This tenant also offered evidence of the rental value of the premises in addition to its actual expenditures made necessary by these proceedings; was unable to relocate and could not continue the business that had formerly been conducted at these premises (R. 331-333). This company had fitted its premises for its business as a lumber warehouse and office (R. 326), and sustained moving costs and loss in depreciation of its stock many times more than the $1,700.00 (R. 65-66) allowed it by the jury.

Merrill J. Brockbank, another tenant, claimed an actual loss of $1,927.80 (R. 395) as a result of his ouster. He had been in the Terminal Building for fourteen years at an annual business of between $40,000.00 and $45,000.00 (R. 376), without a written lease (R. 382). The jury allowed him only $400.00 (R. 62).

The Petty Motor Company, the only tenant the Government concedes had a lease, offered expert evidence of the value of the unexpired term of its lease, to which evidence the Government objected. "Mr. Clay: I object to that, if your Honor please. I think it goes in under the general objections." (R. 471). The jury actually allowed this tenant $360.00 (R. 60), although it offered evidence that the loss it suffered was $3,373.31 (R. 459). Although the Government made no motion for a directed verdict as to this tenant (R. 566), it, nevertheless, has appealed from this judgment and lumps this case in with the rest and asks for a reversal of this along with the others.

The Government offered no evidence as to any of the tenants upon which just compensation could be based, or of the rental value of the entire building. None of the evidence

of expenditures, costs, or increased rent was introduced or received as independent evidence of the value of the individual tenants' occupancy or of the amounts to be allowed as or in addition to such value. There was no attempt to introduce evidence or recover for loss of business, loss of profits, or destruction to business (R. 160-161).

F. Orin Woodbury, characterized by the Government in its brief as "a real estate agent" (Page 6), was definitely instructed in giving his opinion of the value of the occupancy of the premises on the date of their appropriation not to consider evidence of expenditures, costs, increased rent and the like as independent evidence of the value of the occupancy; that that evidence was only to be considered as an aid in determining the value of the occupancy (R. 291-292). He fixed the value of the occupancy of the Grocer Printing, Independent Pneumatic Tool, Chicago Flexible Shaft, and Galigher Companies as above indicated. He also testified that a month-to-month tenancy is valuable, but it cannot be sold on the market (R. 312). This is very different than the impression conveyed by the Government in its brief (Page 6), that the tenancies had no value because they could not be sold on the market, and that Mr. Woodbury's valuation was made up from these costs. Mr. Woodbury, instead of being a real estate agent, is the General Manager of the Woodbury Corporation, engaged in brokerage, property management, appraising, and one of the two certified property managers in this state (R. 271), one of the seven persons employed by the Government from the entire United States to direct the decentralizing of governmental departments and in the removing of them from Washington, D. C., to New York, Philadelphia, St. Louis, Richmond, Chicago, and other places, and in negotiating for the use and occupation of offices and buildings for the departments moved (R. 272-273). He had a wide experience in Salt Lake City in property management and in values to

tenants of long standing of the space occupied by them; was personally familiar with the old and new locations of the individual businesses of the tenants, of the shortage of available space, of the long occupancy and particular nature of the tenants' businesses, and the value because of being located in the center of the mining-machinery district, the type of business catered to and engaged in by three of the tenants (R. 272-292). Mr. Woodbury was the only expert who pretended to give a comprehensive valuation to the tenants' property (R. 293-294). Even the Government's experts admitted that written leases may be a distinct disadvantage and that there may be a definite advantage in oral leases; that it depends on the circumstances in each individual case whether it is an advantage or disadvantage (R. 492). Of course, this is obvious. None of the Government's witnesses attempted to do anything more than give the reasonable rental value of vacant space, and as testified by Mr. Gaddis, did not pretend to testify about the value of the occupancy to the individual tenants (R. 492).

The day after this action was filed, these tenants were ordered to vacate their premises, most of them by November 17, a period of one week, and the latest, the Grocer Printing Company, by December 1. The Government was granted exclusive possession of the tenants' premises and the tenants were ousted therefrom (R. 7). No appraisements were ever made of our interests, none of the tenants were offered anything by the Government. They were shunted back and forth between the office of the United States District Attorney and the Army Engineers, and in the language of the United States Attorney at the pre-trial, they were still "on the merry-go-round" (R. 91-92).

In its statement (Page 7) the Government gives the impression that the trial court told the jury that it would be for the jury to decide whether the measure of damages

for loss should or should not be based upon the cost of moving and the like. This is inaccurate. At the beginning of the trial what the court said was "the measure of damages may or may not be determined by the cost of moving to the new location, the difference in rent, etc." (R. 160), indicating clearly that then he was undecided on that matter. But in his instructions to the jury at the conclusion of the trial, the court definitely told the jury those things could not be the measure of damage. (R. 573). In the pre-trail order (R. 38), the court definitely fixed the issue as the reasonable value of the premises taken so far as the owner was concerned, and with reference to the tenants, "the compensation, if any, they may be entitled to recover by reason of having to relinquish occupancy of said premises." Until the pre-trial, the landlord never knew that the Government was going to contend that all that was necessary was to pay the landlord and that it was up to him to take care of the tenants; that the only issue was the reasonable rental value of the building to June 30, 1945, and that whatever the landlord gets "he will have to pay out to the other people." (R. 115-116).

There was never any condemnation of the Terminal Building. There was never any evidence offered or received of its reasonable rental value. The Government made the reasonable value of the Terminal Building a moot question.

While the trial of these cases was proceeding in March of 1943, and after the tenants had all been ousted and their premises taken by the Government, the Government entered into a negotiated lease with Mr. Richards, the landlord, for the entire building, covering a period from about March 28, 1943, to June 30, 1943, with an option to renew each year for ten years (R. 317-318). This lease had nothing whatever to do with the tenants, made no provision for

them either on behalf of the Government or the landlord, and was solely the result of the negotiations between the landlord and the Government (R. 567-568). Neither the jury nor the court ever had an opportunity to fix the value of anything secured by the Government from the owner.

The case as to the landlord was dismissed in open court when the Government joined in a motion to dismiss at the conclusion of the trial (R. 568 and Government's brief 9). In its brief, as a footnote (Pages 3 and 4, Brief on Certiorari and p. 27 of last brief), the Government gives the impression that the dismissal was at the instance of the court and that there has been no formal judgment entered thereon. As a matter of fact, the Government joined in the motion to dismiss which was granted by the court, and each of the judgments in favor of the tenants, with the exception of the Gray-Cannon Lumber Company, expressly recites:

> "It having been stipulated that the United States of America, the petitioner herein, as a result of these proceedings, had entered into a lease of said Old Terminal Building with the owners thereof, which said lease made no provision for any compensation to the defendant (naming the tenant), either by the petitioner herein or the owners of said building, and the said petition herein having been dismissed as to the owners of said building, Willard Richards, Jr., and wife." (R. 54, 56, 58, 60, 62, 64).

In its first notice of appeal, the Government recognizes that the case has been dismissed as to the owner, in this language, "Also appeals from the court's order overruling the petitioner's motion to dismiss the action as to all tenant defendants after the court had dismissed the case as to Willard B. Richards and Alice Richards, his wife—landlord defendants." (R. 68). In its notices of appeal, the Government does not appeal from the order of dismissal as to the

owner (R. 68-74), in spite of the contrary statement in its brief (page 27). In its notice of appeal to the owner it appeals only from the judgments against the tenants (R. 73-74). Both in the Circuit Court of Appeals and here the Government obliquely injects by footnotes in its brief the imputations that the dismissal as to the landlord was not at its desire and that it is incomplete.

The Government insisted that whatever the owner gets he will have to pay out to the tenants (R. 116), in spite of the fact that it also insisted that the tenants were not entitled to anything (R. 93, 95, 103). (See also Government's Brief, p. 9). The Government, by entering into a three-month renewable lease and consenting to the dismissal as to the landlord, made the value of the entire building a moot question. The lease was entered into without any consultation of the tenants or any consideration of their interests.

In view of the Government's indirect argument that the terrific expenditures of the war should cause this court to look askance at the $10,000.00 allowed herein, because of its effect elsewhere throughout the nation, it is interesting to note that after the Government secured possession of our property, it proceeded to spend money with abandon, put in and tore out partitions, knocked out walls, covered the floors with hardwood, paid overtime, double time, paid exorbitant prices for electric lights and conduits to the tune of $78,500.00 (R. 109-112), to make our quarters, which were perfectly adequate for us without any expenditures, meet its ideas of quarters suitable for the Army Engineers. At the time of the trial, the basement had not been put to use (R. 113). Since that time it is common knowledge that the Government installed in the basement a cafeteria, and instead of $78,000.00, it actually spent $100,000.00 in the remodeling with an additional $22,000.00 for the cafeteria.

Then, after ousting us, spending all this money, it gave notice that it would vacate the entire building March 1, 1944, less than a year after the lease was entered into. These matters have a bearing on questions to be considered later in the brief. (In the footnote 13, page 29, Government Brief, it is stated that the War Department and other Government agencies occupy the building. After the Army Engineers, for whom the building was taken, moved out, O. P. A., then occupying rent free quarters, moved into the building and is now occupying most of it.)

At the conclusion of the evidence the court instructed the jury that this was not an action to condemn leases; that the Government wasn't interested in Mr. Petty's lease or any other leases; that what the Government wanted was the right to occupy this building; that it had entered into a lease with the owner of the property and in these proceedings wanted to take away from these tenants their right to occupy certain portions of the building; that these tenants' rights of occupation constituted property and property rights; that they were entitled in return for these rights taken by the Government to just compensation; that "just compensation" are words of general meaning; that the owner cannot be deprived of his property for public use without just compensation and that there had been introduced a wide range of testimony; that a lease, written or verbal, is more valuable, if it is valuable at all, and a greater liability, if it is a liability at all, than a holding at will; that some leases rebound to the advantage of the owner and some to the advantage of the tenant; that under the law of Utah the owner may give notice to a tenant at will to move out fifteen days in advance, but that nobody else can give that notice; that his tenancy is good against all the world, including the United States Government; that had the Government seen fit to take over this property by purchase or lease, it could have been in a position to give

that notice; that it did not do so, but brought suit for condemnation instead; that the tenancies in many cases had lasted for years and years, but that these holdings were uncertain and that the value of the occupancy must be considered in the light of this uncertainty; that the jury was not called upon to award the expenses of moving, improvement or arrangement or rearrangement of new quarters nor the new rent for any length of time or the difference between the old rent and the new rent. "That cannot be the measure of the rights of recovery." That if the tenants have not been deprived of anything, if they are just as well off as they were before, they would not be entitled to recover anything. Now that they have moved, was their right to occupy their old premises of greater value than they were paying? "That is a question for you to determine. What length of time would that occupation fairly and reasonably cover, taking all of the evidence in the case with respect to each individual tenant?" (R. 569-574).

The jury followed the court's instructions and did not allow the costs of moving, renovating, increased rent, and its verdicts positively indicate that if it considered these items at all, it did so only as incidental in determining just compensation to be paid for the taking of the tenants' property by the Government herein.

The jury's verdicts are only a fraction of the actual money loss to the tenants directly resulting from their eviction.

ARGUMENT

Introductory

The facts and circumstances in the instant cases are unique. Precedent so far as analagous facts are concerned

is non-existent. Cases where the entire fee is condemned, whether subject to leasehold interests or not, or where the entire estate of both the landlord and the tenants is condemned, are not controlling and frequently are not particularly enlightening. However, principles announced by this Court and by other federal appellate courts were helpful and controlling guides to us and the trial court in attempting a solution of the problem presented here. Since the General Motors decision it seems clear to us as it did to the Circuit Court of Appeals that this Court in that case applied and reaffirmed those principles announced by the Court for more than fifty years in case after case involving the proper application of the Fifth Amendment. While the facts in the General Motors case are novel, the law applied thereto is not new. Cases cited and applied in the General Motors case are from a long line of decisions uniformly announcing established principles which in turn were applied to the facts presented in that case.

We know of no case in this Court, where property has been taken for a public use, that compensation has been denied. Certainly not upon the ground that the property taken had no value because the condemnor after taking it claimed through the process of definition that it never existed.

SUMMARY

Point I.

THE SUBSTANTIAL RIGHTS OF THE GOVERNMENT HAVE NOT BEEN AFFECTED BY THE JUDGMENTS HEREIN, NOR IS THE GOVERNMENT IN ANY POSITION TO MAKE COMPLAINT HERE AGAINST EITHER OF THE LOWER COURTS.

In the lower courts the Government was not consistent in the various theories it urged upon the courts; abandoned

principles it had once advocated; asked the courts to adopt theories which were conflicting with each other; has changed its theory in this Court from the theory insisted upon in the lower courts; gave the trial court no help whatever, and by entering into a negotiated lease with the landlord eliminated from the case the principle for which the Government contended throughout the trial. Also, the substantial rights of the Government are not affected because even had there been error in the admission of evidence and in the instructions to the jury—which there was not, the jury's verdicts are not based in whole or in part upon any evidence or instructions of the court objected to by the Government, and are far less than the respondents were entitled to receive.

Point II.

THE RESPONDENTS' TENANCIES WHETHER MONTH TO MONTH OR OTHERWISE GAVE THEM THE RIGHT TO OCCUPY THEIR PREMISES WHICH WERE THEIR BUSINESS HOMES, AND SUCH TENANCIES AND RIGHT OF OCCUPATION WERE PROPERTY.

All of the respondents, with the exception of the Petty Motor Company, were tenants without written leases. We are considering the Gray-Cannon Lumber Company and the Independent Pneumatic Tool Company the same as the other tenants. The Government contended that neither one of them had a lease, and we will accept that contention so the Government cannot complain if we accept and adopt its own theory at the trial with reference to these two tenants. All of these tenants were completely evicted and their premises were wholly occupied by the Government. There is no question in this case of moving back to the Terminal Building at the expiration of the Government's occupation, no claim for loss of business, loss of profits, or for payment of the value of machinery or equipment. No tenant asked

for anything except the present value of his right to occupy his premises in the Terminal Building. "Property" as the word is used in the Fifth Amendment includes such tenancies as those of the respondents in the Terminal Building.

Point III.

RESPONDENTS' PROPERTY WAS TAKEN FOR PUBLIC USE.

The early limitation upon the word "taken" is not now accepted. The idea that only that which actually physically is appropriated is "taken," is erroneous. If the taking results in depreciation, destruction or loss of use of property other than that actually physically appropriated, such depreciation, destruction or loss of use may be considered in determining just compensation for that which is taken. However, in the present cases, no award was asked and none was given for any depreciation, destruction or loss of use of property. We did not ask compensation for our fixtures or for any of their value. All that we asked was for that which was actually taken—just compensation for our occupancy, our business homes, our premises. All evidence was recevied only as aids in measuring that value.

Point IV.

FOR THEIR PROPERTY TAKEN BY THE GOVERNMENT FOR PUBLIC USE THE RESPONDENTS ARE ENTITLED TO JUST COMPENSATION—THE VALUE OF THEIR TENANCIES OR RIGHTS OF OCCUPATION AT THE TIME THEY WERE TAKEN. MARKET VALUE AND JUST COMPENSATION ARE NOT ALWAYS SYNONYMOUS, PARTICULARLY IN DETERMINING THE VALUE OF LEASES. EVIDENCE ADMITTED IN THESE CASES IS RELEVANT IN DETERMINING JUST COMPENSATION, EVEN UPON THE "MARKET VALUE" BASIS. THE VERDICTS FOR THE TENANTS ARE NOT MORE THAN THEY WERE ENTITLED TO UNDER THE FIFTH AMENDMENT.

In determining just compensation it is proper to consider those elements which would be considered by a vendor and vendee fairly seeking to arrive at a fair figure which would be paid the vendee and accepted by the vendor for the particular thing sought by the condemnation. Consideration of the cost of moving equipment and machinery and like expenses does not involve consideration of consequential damages. In these cases no effort was made to secure payment for consequential damages, the verdicts contained no awards for consequential damages, and the use of the words "consequential damages" in these cases is inaccurate and a misnomer. The verdicts on their faces show that the jury made no attempt to award moving costs, increased rent, expenses of new premises and the like—the verdicts in each instance being far less than the actual out-of-pocket expense of the respondents, and far less than the actual value of their leases. No elements were considered and no evidence was received in these cases that would not be fairly considered between a vendor and a vendee, the vendor and vendee trying fairly to arrive at a fair figure to be paid a tenant for his business premises.

Point I.

THE SUBSTANTIAL RIGHTS OF THE GOVERNMENT HAVE NOT BEEN AFFECTED BY THE JUDGMENTS HEREIN, NOR IS THE GOVERNMENT IN ANY POSITION TO MAKE COMPLAINT HERE AGAINST EITHER OF THE LOWER COURTS.

(*a*) *The substantial rights of the Government are not affected. Title* 28, *Section* 391, *U. S. C. A., provides in part as follows*:

> "(Judicial Code, Section 269 amended.) *New trial; harmless error.* * * * On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give

judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In view of this section and cases too numerous to cite interpreting it, it is difficult to see any merit in this appeal. The Government was not our landlord, but it took our property, our business homes, evicted us from our premises peculiarly adapted to our businesses, where we had become established throughout the years, damaged us to the extent of thousands and thousands of dollars as a direct and proximate result of that taking and seeks to avoid any compensation for the taking. It spent in excess of $100,000.00 in remodeling our premises to make them satisfactory for its use, when they required no such expenditures to satisfy our requirements, and because the jury awarded us $10,000.00, a mere token payment in comparison with our actual loss, the Government complains. The verdicts were extremely favorable to the Government.

Under the Fifth Amendment private property cannot be taken for public use without just compensation. If this provision is to be construed as contended for by the Government, then "it becomes almost as much a sword as a shield to the private citizen," and to say that our property has not been taken is to say that what has actually happened never occurred. Even had the court directed the jury to award us our moving costs and increased rent, the Government could not complain because the jury did not do so. In every instance it gave us far less than justice and equity should require. In view of what the court actually instructed the jury and what the jury actually did, there was no injury to "the substantial rights" of the Government. The shoe is on the other foot. We felt we were entitled to far more liberal instructions

than were given, since, as we shall show, the authorities generally hold that the provisions of the Constitution shall be liberally construed to protect the private citizen and shall not be construed to enable the sovereign to confiscate private property by the aid of technical refinements or abstract definitions. Just compensation means just compensation. It means fair dealing. If the Fifth Amendment affords us no protection from this confiscation, it is meaningless.

Neither of the questions presented by the Government's Brief are relevant under the facts in these cases. The jury did not award us moving costs or consequential damages, nor did it award us compensation for an indefinite period of time. Regardless of any evidence received or any instructions given by the court, it is evident from the amount of the verdicts herein that the Government has not been injured. The actual money damages to the tenants are three times the amount of the verdicts. The cases have been through three courts. "This last consideration (that it took seventy-five days to try the case) has been held to obviate reversal when the amount involved was, as here, negligible in comparison with the whole amount in controversy, and with the expense of another trial." *United States v. Chicago B. & Q. R. Company*, 82 Fed. (2d) 131, 140. See also *Des Moines Wet Wash Laundry v. City of* Des Moines, 197 Iowa 1082, 198 N. W. 986; *State v. Pingree*, 148 Pac. (2d) 336 (Utah, 1944, not yet reported in Utah Reports). In the Iowa case the Court said, "It is evident from the verdict returned that the jury correctly interpreted the instruction, and treated the evidence, not as items of damage, but as an essential guide in determining the value of the leasehold taken." In the Utah case, the state (appellant) contended that improper evidence had been introduced. But the jury's verdict indicated that it had not been controlled by such evidence. The Utah Su-

preme Court said, "In view of this fact, it becomes immaterial whether there was other inadmissible evidence received or whether the instructions complained of were erroneous." The state urged that the court rule on the admissibility of the evidence, "in order that the law thereon may be settled." This the Supreme Court refused to do, "since a decision on those points is not necessary." The judgment was affirmed.

(B) *The government is in no position to complain here.*

The Government has changed its position from day to day and from court to court. To quote Mr. Justice Holmes in *International Paper Company v. United States*, 282 U. S. 399, 406, 75 L. Ed. 410, "The Government has urged different defenses with varying energy at different stages of the case. * * * The Government exercised its power in the interest of the country and in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had."

The Government concedes (Page 5 of its latest brief here) "that at the trial" the Government contended that the only issue between the United States and the various defendants, including the owner and the tenants, was the fair rental value of the entire building for the period taken and that the apportionment and distribution of the sum thus determined was a matter to be worked out between the landlord and the tenants." Now, however, in the footnote at Page 12 of its brief accompanying the petition for writ of certiorari it admits "In view of the fact that the settlement made with the landlord in the instant case did not require the owner to indemnify the Government from claims of lessees, the United States does not deny that it is primarily liable to the tenants." It made no such admission in the trial court nor in the Circuit Court, so it

is difficult to see how it can complain that both courts refuse to adopt a postion which the Government now admits was wrong. On Page 27 of its latest brief, footnote 11, it is difficult to understand what the Government's latest position is on this point. Apparently counsel have not yet determined whether to adopt the former position or the position announced in the preliminary brief herein. From the footnote 11 it might seem that there is some question as to whether or not the lease with the owner of the building provided compensation for the tenants. As a matter of fact, there is no doubt on this score. The lease made no provision whatever for the tenants and is strictly between the United States and the owner of the property regarding their rights only (R. 567). There was another point that the Government relied upon in the lower courts and that is that under no circumstances was evidence relevant concerning moving costs and the like. It is now settled that moving costs are relevant as evidence to be considered in determining the value of rights and property taken under eminent domain. Both positions assumed by the Government in the lower courts concededly were wrong, and before a party should be heard to complain he should first establish that he was denied something to which he was entitled and which he clearly and specifically requested from the lower court. The Government asked the Circuit Court to reverse the judgments with instructions. "First, to determine the fair market value of the estate taken (the rental value of the building as a whole), and then to apportion the award between the landlord and the tenants according to their respective interests." (Government's brief, Page 30.) Obviously, this would not be the correct solution of the problem, since the landlord is already receiving under his lease everything to which he is entitled; at the time of the trial no one knew what estate the Government had under its lease, the only thing definite being a three months' renew-

able term; nothing was taken from the landlord by eminent domain, and obviously dividing between the landlord and the tenant the rental value of the building as a whole for three months would solve nothing so far as the tenants were concerned and might give the landlord something in addition to what he was entitled to under his lease. The Government asked the Circuit Court to do an impossible thing. Here the Government apparently contends that we are entitled to nothing, the second paragraph of its latest brief, Page 39, reads: "It is submitted the month-to-month tenants were entitled to no compensation for the taking of the Old Terminal Building." Even this argument is modified at Page 39 of the brief by an admission found nowhere else in this case and advanced here for the first time to the effect that the most we would be entitled to would be whatever portion of fifteen days remained after the period between November 11, 1942, and our dispossession. If a month-to-month tenancy has no value, it is not readily perceived why the tenants should have the short period between November 11 and the date of our dispossession, or why the Circuit Court or the trial court is to be reversed for not determining the rental value of the building as a whole and then dividing it between the landlord and the tenants.

The fact of the matter is that on the record it has made in these cases the Government has taken no consistent understandable position and has presented to this Court no issues that are present under the facts of these records. It has presented theoretical questions which even if answered should not affect these cases because the questions presented are not present here.

The thing that the Government really wants this Court to declare is that the Government has the right without compensation to dispossess, regardless of the damage done

to the person dispossessed, any person occupying his premises on a month-to-month lease. Stated another and shorter way, the Government is seeking a declaration from this Court that the protection of the Fifth Amendment does not apply to month-to-month tenants. The results that would follow from such an authorization for governmental confiscation need not rest in speculation. They are present here in the actual damage done these tenants. Multiply this damage to the nation-wide extent that would follow any such governmental immunity from the Fifth Amendment and we would have a situation which "staggers the imagination." (The quoted words are from Government's Circuit Court brief as to results that would follow from giving effect to Fifth Amendment in our cases.)

The Trial Court got no help from the Government; in fact, the Court finally reminded the United States Attorney, "You cannot stay in the middle of the road all the time." (R. 568). At one point, the Government's attorney stated that the rental paid by these tenants was not admissible and then almost immediately thereafter conceded that it was admissible (R. 120, 121, 122). He insisted that the Government was condemning real estate in spite of the fact that it is obvious that the condemnation petition asked for approximately a seven months' renewable lease (R. 135). Again, the Government contended that the jury must determine the reasonable rental value of the building taken to June 30, 1945, although the lease could be terminated two years earlier, and that whatever the owner gets he will have to pay out to the tenant (R. 116), in spite of the fact that the Government insisted that the tenants were not entitled to anything (R. 93-95, 103). Then it abandoned all proceedings against the landlord, having entered into a three-month renewable lease with him (R. 316, 568). During the trial the Government objected to the offering of evidence

as to the tenants who were on a month-to-month basis and yet also made the same objections to the evidence of those who had leases (R. 470-471).

In the Circuit Court the Government presented three questions:

"1. Whether the United States must pay more than the fair market value of property condemned when the property taken is subject to lease-hold interests.

"2. Whether in a proceeding to condemn the use of a building, testimony as to the expenses incurred by tenants of the building in moving out is admissible either as the measure of damages or as evidence to be considered in determining such compensation.

"3. Whether the tenants of the building condemned in this case had sufficient interests in the property to entitle them to share in the compensation to be paid for the property taken."

Obviously, Question 1, in speaking of the fair market value of property condemned refers to the Old Terminal Building as a whole. This building was not condemned. The United States was not asked to pay more than the fair market value of the property. Nobody knows what its fair market value is, and the Government's own action made that question moot.

Question 2 has been answered adversely to the Government by this Court in the General Motors case.

Question 3 had no relevancy because the tenants were not seeking to share in the compensation to be paid for the condemnation of the Terminal Building. No such question is or ever has been present in this case. No compensation is to be paid for condemnation of the Terminal Building. It was not taken by condemnation and no tenant is

asking to be paid anything by the landlord or to be paid anything from the money he receives from the Government for his building. None of the questions raised in the Circuit Court are presented here.

Under such circumstances the Government asks this Court to reverse the two lower courts upon the basis of assumed facts not present and for failing to adopt principles which were not clear to the Government itself.

The substantial rights of the Government have not been affected; the Government is in no position to complain here.

Point II.

THE RESPONDENTS' TENANCIES WHETHER MONTH TO MONTH OR OTHERWISE, GAVE THEM THE RIGHT TO OCCUPY THEIR PREMISES, THEIR BUSINESS HOMES AND SUCH TENANCIES AND RIGHT OF OCCUPATION WERE PROPERTY.

(*A*) *The Act of Congress involved herein recognizes and provides for such rights as property.*

Most cases of eminent domain involve the taking of the fee to real estate or some permanent use of real property, and are not comparable to situations present in the instant cases.

The Act of Congress involved herein contains much broader powers than are usually exercised in eminent domain proceedings. Congress knew that these powers would be used in every part of the nation and was familiar with conditions prevailing in every community wherein they would be exercised. The members of Congress come from those communities. They are a part of them. Congress passed the Act knowing that this Court has not given any narrow, restricted, or technical construction to the Fifth Amendment. Congress also knew that it was not within its

province nor within its power to define just compensation or prescribe the rules for determining it, to prescribe its limits or limit the application of the Fifth Amendment by attempting to define what is and what is not property. This Court has so held for a great many years, as will appear from citations hereafter in our brief. Congress knew that, "The war or the conditions which followed it did not suspend or affect these provisions." (Fifth Amendment). It made ample appropriation to compensate those whose property was taken under the Act in the furtherance of the war effort. Congress did not and could not directly or indirectly attempt to authorize "trespas upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights." Congress knew that it is "a settled principle of universal law that the right to compensation is an incident to the exercise of that power (condemnation); that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle." Congress knew when authorizing the taking of "any real property, temporary use thereof, or other interest therein," that the Constitution "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

When Congress authorized the taking of the temporary use of real property "or other interests therein" it knew that in many, if not most, of our smaller cities and towns, written leases are not generally used. It knew that tenants occupied premises without written leases. It knew that in Utah, for instance, a tenancy from month to month is just as inviolable in the eyes of the law as a tenancy for

nine years. Neither the landlord nor anyone else may trespass upon such a tenancy. It is the absolute property of the tenant and gives him the absolute right to occupy that property to the exclusion of anyone else, including the landlord and the United States of America. Congress knew that business in the smaller cities and towns is not conducted as it is, for instance in New York, Chicago, and other large cities. The illustration of this is the situation existing in the present case. Of the seven tenants, those who had been in the building the longest had been there from fourteen to twenty-six years without written leases, under several different owners. There was always a mutually satisfactory relationship. It must be assumed that Congress knew of such situations generally, and that in granting the broad powers it did under the Act in question, it had such interests and conditions in mind. By authorizing their condemnation, Congress intended that compensation should be paid for them and made appropriations for that purpose because it knew that condemnation is inseparably connected with the right to compensation. The legislative authorization to condemn "other interests in real property" is a congressional recognition that such interests are property. If condemnation is the method used for acquiring them that, of itself, is a recognition of the right to compensation. The very fact that Congress recognized such rights as subjects of eminent domain and thus compensable, demonstrates that Congress considered them to be property and did not intend the Government to seize them and then deny liability on the claim they were not property, that the war and its tremendous costs required it, or for any other reason.

(B) *The respondents' tenancies were property within the meaning of the Fifth Amendment under long established decisions of this Court and other courts of last resort.*

This Court has also clearly spoken on the subject. "Though the meaning of 'property' as used in * * * the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." *U. S. ex rel. T. V. A. v. Powelson,* 319 U. S. 266, 279 L. Ed. 1390, 1400. "The constitutional provision is addressed to every sort of interest the citizen may possess. * * * The right to occupy for day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value." *United States v. General Motors,* 323 U. S. 373, 89 L. Ed. Ad. Op. No. 6, 379, 382, 383. The right to the use of anything is property (i. e. water). "There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power, it is hard to see what more the government could do to take the use." *International Paper Company v. United States,* 82 U. S. 399, 407, 75 L. Ed. 410, 414. In our cases the tenants' rights were to the use of their premises. When those premises are taken by the Government and the tenants completely evicted, "It is hard to see what more the Government could do to take the use."

A mere franchise to occupy the streets with poles and wires for a power line is property if the law of the state in which the franchise is exercised so holds. The definition of property may be determined from the law of the state where it is located. *United States v. Puget Sound Power and Line Company,* 147 Fed. (2d) 953 (November, 1944).

Under Utah law a month-to-month tenancy is property, and no one, including the landlord, may invade it. Section

104-60-3 (2), Utah Code Annotated, 1943, provides: (This is identical with the prior Code.)

> "A tenant of real property, for a term less than life, is guilty of an unlawful detainer:
>
> "(2) When, having leased real property for an indefinite time with monthly or other periodic rent reserved, he continues in possession thereof in person or by subtenant after the end of any such month or period, in cases where the landlord or the successor in estate of his landlord if any there is, fifteen days or more prior to the end of such month or period, shall have served notice requiring him to quit the premises at the expiration of such month or period; or in cases of tenancies at will, where he remains in possession of such premises after the expiration of a notice of not less than five days."

A month-to-month tenancy may not be terminated by fifteen days' notice even by the landlord unless the notice prescribed is served exactly as outlined in the statute (Section 104-60-6). "The basis of a suit in unlawful detainer is unlawful possession, and a tenant holding for an indefinite term on a monthly basis is not holding unlawfully until he fails to comply with the demands of a notice which has been properly served on him." *Carstensen v. Hansen*, 152 Pac. (2d) 954, 955 (Utah Supreme Court, October 24, 1944, not yet reported in the Utah reports). That was an action for unlawful detainer by the landlord against the tenant, where the fifteen-day notice was given but not served as provided by the statute. The tenant was held to be lawfully in possession as against the landlord, regardless of the fifteen-day notice.

The trial court in our cases incorrectly referred to some of the tenants as "tenants at will." Under the above quoted Utah law even a tenant at will is entitled to notice

(Sec. 104-60-3 (2), supra), and has such an interest in the property as will prevent the landlord from trespassing on it. In the absence of the tenant, "The Forcible Entry Statute expressed the policy that no person should enter by force, stealth, fraud, or intimidation, premises of which another had peaceable possession. This had the effect of taking away the common-law right of a landlord to possess his own property by no more force than was necessary and left the one against whom force was used to pursue his common-law action." *Buchanan v. Crites*, 150 Pac. (2d) 100, 103 (Utah Supreme Court, July 3, 1944, not yet reported in Utah reports).

Concededly in our cases the landlord gave no notice to quit to any of the tenants. The tenancies were never terminated in the usual manner. They were appropriated by these proceedings. It is, therefore, erroneous to argue that the United States took the temporary use of property "for a period longer than any of the existing leases." The trial court was correct in instructing the jury, "Now, it is the opinion of the court, and I so charge you, that these rights of occupation, whether evidenced by a term lease, written or oral, or simply a lease at will from month to month, is property, and private property within the language and meaning of the Constitution." (R. 569-570). "In the case of a tenancy at will (should have stated month-to-month tenancy), under the laws of the State of Utah the owner may give notice to the tenant to move out, and that notice, if given fifteen days in advance (should have said if given and properly served), is binding upon the tenant to move at the expiration of that period. If he does not move he can be put out by action in the courthouse. But nobody else can give that notice. His tenancy is good against all the world, including the United States Government.

"The Government of the United States, had it or its agent seen fit to pursue that remedy and that method, could have taken over this property by purchase, or by a lease, as it has done lately, as we are informed. And it would have been in a position, after doing that, to give notice.

"But it did not do that. Instead, it brought suit in condemnation, cited these people into court, and a hearing was had on the 10th of last November and order made on the 11th that they surrender the possession to the Government under condemnation proceedings." (R. 571).

It will be noted that the instruction of the trial court was more favorable to the Government than to us, since it referred to us as tenants at will when we were not, and omitted to advise the jury that the giving of fifteen days' notice was not sufficient unless the notice was properly served as required by statute.

The Government did not become our landlord. At the time the Government leased the entire property from Mr. Richards under a three-month renewable lease, we had been out of the property approximately four months, not by virtue of any termination of our tenancies, but by condemnation. The Government had the right to elect the method it would pursue to evict us and having elected to evict us by condemnation it must pay just compensation. "But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay." (Page 407) *International Paper Company v. United States*, supra.

"Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants, or some of them, did not affect the claimant's rights. * * * Here the claimant's possession under its

lease was a part of the res, and therefore was within the implied promise to pay." *A. W. Duckett & Co. v. United States,* 266 U. S. 149, 151, 152, 69 L. Ed. 216, 219. That case holds that "A right may be taken by simple destruction for public use," and also says that even though all interests are extinguished by a condemnation of the fee, the leasehold must be paid for as well as the fee, although the condemnor may not be called upon to specify the interests that happen to exist. This is directly contrary to the contention of the Government in these cases, that all that is necessary is to determine the landlord's interests and divide that among the tenants.

"But the Constitution does not require a disregard of the mode of ownership of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. *It deals with persons, not with tracts of land.* And the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. Boston,* 217 U. S. 189, 195, 54 L. Ed. 725, 727. See also *Phelps v. United States,* 274 U. S. 341, 71 L. Ed. 1083, where the United States requisitioned a pier upon which plaintiffs had a lease. The requisition was under the war powers and the United States was compelled to pay for the temporary use of the pier with interest, that "being consistent with the constitutional duty of the government as well as with common justice."

(C) *The duration of the lease does not determine whether it is property; nor may an arrangement solely with the landlord bind us.*

It makes no difference to the right to compensation that the lease may be terminated on short notice.

> "A tenant's term is property, * * * the fact that the leases are terminable at the option of the railway company upon thirty days' written notice does not destroy the right of the tenant to compensation, but is a circumstance to be considered in determining the amount of the proper award to be made." *State v. Northern Pac. Ry. Co.*, 88 Mont. 529, 295, P. 257, citing *City of Detroit v. Detroit United Ry. Co.*, 156 Mich. 106, 120 N. W. 600, and numerous other cases. See also the later Michigan case (1940) in re City of Detroit, 294 Mich. 569, 293 N. W. 755, citing 1 *Tiffany on Real Property*, 214, 35 C. J. 1120, that a tenant at will is entitled to compensation for the appropriation of his property.

The fact that a lease contained a clause that the lessees would remove upon ten days' notice from the lessor was immaterial to the right of recovery and the condemnor acquired no right under this clause, no such notice having been given. *Shipley v. Pittsburg, C. & W. R. Co.*, 216 Pa. 512, 65 Atl. 1094.

> "The right of the owner of the leasehold interest to compensation is not affected by any agreement made by the condemnor with the owner to pay him for the tenant's rights * * * nor is the right of a tenant to damages for injuries to a leasehold defeated by the fact that, under the lease, the owner may terminate the tenancy on short notice." 18 Am. Jur. Sec. 232, page 866.

"Indeed, when a piece of property which is subject to an ordinary lease for a short term is taken, it may happen that although the owner of the fee is allowed full value of the property, the tenant must also be paid a large and substantial amount in addition, by reason of the value of his lease." *Baltimore v. Latrobe*, 101 Md. 621, 61 Atl. 203.

"The owner of the leasehold and the owner of the reversion together hold the fee simple estate. Each has a dis-

tinct estate or property. * * * Whatever be the method of ascertaining the values of these distinct interests, it is evident that the sum of those values must be the full value of the property taken (citing cases). As the owner of each separate interest has the constitutional right to be fully compensated before his estate can be lawfully taken for a public use, he is obviously entitled to look, not to someone else for that compensation, but to the agency authorized to make, and which actually does make, the appropriation of his property. He cannot be driven to seek redress from another. Hence, it will be no answer to his demand to say that the value of his interest, or of a part of his interest, has been improvidently awarded to someone else." *Glucke v. Mayor of Baltimore*, 81 Md. 315, 32 Atl. 515.

That we need not look to the landlord, but may have our interests separately determined has been approved by this Court from an early time. *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449. See also *A. W. Duckett & Co., vs. U. S.*, 266 U. S. 149, 69 L. Ed. 216.

"The right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an 'estate' or interest in land." *United States v. 53¼ Acres of Land*, 139 Fed. (2d) 244, 247 (Second Circuit); *Brooklyn v. City of New York*, 139 Fed. (2d) 1007 (Second Circuit). These cases applied the law of New York in determining "compensable interest." The last case involved an agreement granting ten-year freight terminal rights for market places with option of renewal, which renewal right might be extinguished by notice. This was held to be a compensable interest in spite of the fact that it might be terminated upon notice. The right to terminate did not make the interest any less property.

but was held to be relevant in considering the question of compensation. This case infers that contracts may not be the subject of condemnation which is not in accord with the holding of this court. *Brooks-Scanlon Corporation v. United States,* 265 U. S. 106, 68 L. Ed. 934. *Russian Volunteer Fleet v. United States,* 282 U. S. 481, 75 L. Ed. 473.

In *Sheehan v. City of Fall River,* 187 Mass. 356, 73, N. E. 544, the Supreme Court of Massachusetts held that a tenant at will could have maintained an action for any wrongful invasion of her premises or injury to her building while her possession continued. The nature of such tenancy might be considered as affecting the amount of an award, but not in determining property rights. "The settlement made with the landowner did not include her damages (the tenant's), for he asserted no title to the buiding, which could have been removed at any time before her estate terminated, and she is not precluded from recovery on the ground that it had become a part of the realty." The case held that the tenant at will had "a sufficient interest in real estate to enable her to maintain a petition under the terms of a statute broad enough to include compensation."

When the Government's contention that month-to-month tenancies are not property for which compensation must be paid when taken under condemnation is analyzed, its error becomes apparent. In these cases, for instance, the Government entered into a three months' renewable lease with the landlord. There is no reason why it could not have entered into a month-to-month renewable lease. It could condemn such a lease in the event the landlord refused to negotiate the same or a lease for any particular time for more or less than a month. It might then argue that such a lease had no value because it was so indefinite as to term or so short as to term that no value could be placed on it. It would argue that it had only dispossessed the landlord for

ten days, fifteen days, or a month, and that, therefore, any hardship or inconvenience he may have incurred in moving out of his property was only consequential; that he had his property back at the end of the time, and that since the Government had not taken any of his equipment or fixtures, there could be no recovery except for the time the premises were occupied, and since that time was so short as to have no market value, there need be no compensation. The Government confuses property with the determination of just compensation. Because the determination of just compensation requires the application of rules other than fair market value does not demonstrate that the thing taken is not property. "The constitutional provision (property) is addressed to every sort of interest the citizen may possess." *United States v. General Motors,* supra.

In the General Motors case, this Court points out the error of contentions such as made by the Government: "In any case where the Government may need private property, it can devise its condemnation so as to specify a term of a day, a month, or a year, with optional contingent renewal for indefinite periods, and with the certainty that it need pay the owner only the long-term rental rate of an unoccupied building for the short-term period, if the premises are already under lease, or if not, then a market rental for whatever minimum term it may choose to select, fixed according to the usual modes of arriving at rental rates."

In our cases, however, the Government is making a contention that has more far-reaching results than that. It contends that such tenancies are not property, and, therefore, instead of fixing any mode of arriving at rental rates it would pay nothing, because it argues that it has taken nothing and any harm to the property owner is "consequential." In the General Motors case this language answers the Government's contention: "If such a result

be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guarantee becomes, not one of just compensation for what is taken, but an instrument of confiscation." The Circuit Court said in its Opinion below: "The Government would in this case convert the Fifth Amendment from a guarantee of just compensation into an instrument of confiscation."

In our cases, the Government by its negotiated lease with the landlord, made unnecessary the valuation of the landlord's estate, to wit, the temporary use of the Terminal Building. There was no fund representing such value from which the tenants could be paid in accordance with the Government's contention. The Government, not the court or jury, fixed the owner's compensation, and while contending that we have no right to compensation, also asserts that our rights are to share in such a fund which, by its own action, is non-existant. As said by Mr. Justice Holmes in *Boston Chamber of Commerce v. Boston*, supra, "The statement of the contention seems to us to be enough."

(*D*) *A reference to the Independent Pneumatic Tool Co.*

Inasmuch as the Government contended that the Independent Pneumatic Tool Company had no lease (R. 485-487), and apparently the trial court and the Circuit Court adopted that contention, it comes too late now for it to change position and rely upon a release which it contended did not exist. However, later in this brief, in discussing the Government's arguments and cases, we shall present this matter further. For our present purposes it seems sufficient to assert that upon the face of it the condemnation provision in the Independent Pneumatic Tool Company lease has no bearing here. These proceedings terminated

the lease regardless of any of its terms so specifying. There was no taking of the landlord's estate by condemnation; there was no award to the landlord for his property. The tenant is asking for no part of the landlord's remuneration from the Government or for any adjustment of his rent. Nothing belonging to the landlord was taken by condemnation. The lease contemplated that the tenant should have nothing of the award to the landlord, and that the landlord should have no right to further rent from the tenant. The Government, however, is asking that the lease be construed to defe the tenant's right to just compensation because of a provision that concerned only the landlord and the tenant. All that occurred here so far as the landlord was concerned was that the landlord has the United States as a tenant instead of the Independent Pneumatic Tool Company, not by condemnation but by a negotiated lease, after the Government had made such a lease possible by evicting the tenant under the power of eminent domain. The tenant did not contract in his lease to relieve the Government from paying him for loss suffered by him which was independent and entirely separate from the landlord. There was and could be no award to the landlord in our case nothing in which the tenants could join, and this by reason of the Government's own act, and so the provision of the se is inapplicable. The Government did not succeed to any of the landlord's rights in these proceedings.

We thus submit that as to each tenant its tenancy was private property at the time it was taken, when they were ousted from it, and possession was taken by the Government.

Point III.

RESPONDENTS' PROPERTY WAS TAKEN FOR PUBLIC USE.

(*A*). *The tenants neither asked nor received compensation for anything not taken.*

The Government confuses, as do many of the cases cited by it, the property taken with the evidence for determining compensation for it.

In the Circuit Court the Government contended at length that, "Neither the business nor the property which had to be moved by the tenants was taken." (Government's Brief, Page 21). There was no issue to the contrary. We have never contended that the Government took our business, our fixtures, or the property that was moved. We neither asked nor were we awarded compensation for any of those things. No evidence whatever was offered and it was stated at the outset that no claim was made for any loss of profit or loss of business. No attempt was made to recover the value of fixtures, business, or profits.

(B) Consideration of what constitutes a taking of property.

There may be a taking of property by an invasion, destruction or partial destruction without an actual physical appropriation. The deprivation of the former owner, rather than the interests acquired by the condemnor measure the taking. Governmental action, short of acquisition of title or occupancy, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, amounts to a taking. *United States v. General Motors,* supra.

"A right may be taken by simple destruction for public use." *Duckett v. United States,* 266 U. S. 149, 151, supra.

"While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. * * * The taking by condemnation of an interest less than the fee is familiar, in the law of

eminent domain." *United States v. Cress*, 243 U. S. 316, 328, 61 L. Ed. 746, 753.

"There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; * * * it is hard to see what more the government could do to take the use. * * * Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; (the use and occupation of the tenant's premises in the instant cases) that it relied upon and exercised its power of eminent domain to that end." *International Paper Company v. United States*, supra. (Pages 407, 408 of U. S. Reports).

"Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago R. I. & P. R. Co. v. United States*, 284 U. S. 80, 96; 76 L. Ed. 177, 186 (1921).

"Acts of Congress are to be construed and applied in harmony with and not to thwart the Constitution." *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 491, supra. *Phelps v. United States*, 274 U. S. 341, 343, 344, 71 L. Ed. 1083, 1085.

"Plaintiff's consent was not sought; it was not consulted as to quantity, price, time or place of delivery. * * * Plaintiff's property was taken by eminent domain." *Liggett & M. Tobacco Company v. United States*, 274 U. S. 215, 220, 71 L. Ed. 1006, 1008.

So to the extent that the United States deprived us of the use of our property or by its acquisition, prevented us from using it, destroyed it or depreciated it in value, there was a taking. And for the property taken there must be paid just compensation.

(C). The very act of asserting the power to condemn, recognizes both a property right and a taking, for which compensation must be paid.

When the sovereign exercises the power of eminent domain and takes property under that power, it cannot claim that there is no compensation due. It is not within the province of the condemnor to say, "The property I have taken has no value." The very act of taking property by eminent domain establishes that it must be paid for and that it has a value. "But where, as in this case, the property owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon the principle that the government, by the very act of taking, impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require, * * *" *United States v. Cress*, supra, 243 U. S. 329.

"Moreover, it has long been established that, where, pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the government is under an implied obligation to make just compensation. That implication being consistent with the constitutional duty of the government, as well as with common justice, the owner's claim is one arising out of the implied contract." *Phelps v. United States*, supra, 274 U. S. 343.

"Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation." *Russian Volunteer Fleet v. United States*, supra, 282 U. S. 489.

There having been a taking of our property by the power of eminent domain, the United States is bound to pay us just compensation.

Point IV.

FOR THEIR PROPERTY TAKEN BY THE GOVERNMENT FOR PUBLIC USE, THE RESPONDENTS ARE ENTITLED TO JUST COMPENSATION—THE VALUE OF THEIR TENANCIES OR RIGHTS OF OCCUPATION AT THE TIME THEY WERE TAKEN. MARKET VALUE AND JUST COMPENSATION ARE NOT ALWAYS SYNONYMOUS, PARTICULARLY IN DETERMINING THE VALUE OF LEASES. EVIDENCE ADMITTED IN THESE CASES, IS RELEVANT IN DETERMINING JUST COMPENSATION, EVEN UPON THE "MARKET VALUE" BASIS. THE VERDICT FOR THE TENANTS ARE NOT MORE THAN THEY WERE ENTITLED TO UNDER THE FIFTH AMENDMENT.

(A) *Courts construe the Fifth Amendment liberally in favor of citizens, and are watchful to see that technical rules and stealthy encroachments are not allowed to defeat the constitutional right to just compensation.* It is no longer open to doubt that "market value," so-called, as defined in some cases where the fee is taken, is not synonymous with just compensation. "In the ordinary case, for want of a better standard, market value, so-called, is the criterion of that value. In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value."

Some of the cases, as did the Government in the Circuit Court, make the argument that, "The law charged the plaintiff with notice that it was subject to be deprived of the use of the leased premises by the exercise of the power of eminent domain." *Gershon Bros. Company v. United States*, 284 Fed. 849 (Government's Circuit Court Brief, Page 21), and from that premise build the argument that loss suffered by the condemnee is but an incident of his ownership of property which must be expected and borne by him as one subject to the will of the sovereign.

Also, some courts have denied recovery by misapplying the term "consequential damages" and defining losses as consequential damages, when in truth they are the direct and proximate result of the condemnation, and in no sense consequential. What might be classified as consequential damages in condemnation of the fee which has a market value cannot be classed as consequential damages in condemnation of the temporary use of property, real or personal, where there is no such so-called market value. In condemnation of the fee all of the elements which go into the making of value are considered in establishing the market value, and included in these elements are the uses to which the property is or may reasonably be put, the improvements upon it, its location, its suitability, its productivity, and every other element that goes to make it valuable. Thus there is justification in refusing to duplicate as separate elements things that have already been considered in determining market value. Such elements have been erroneously called "consequential" and rejected in determining "just compensation" where market value so-called is inappropriate as a rule of value. That such rejection is error is now established. The rules for the condemnation of the fee are only of general assistance in determining just compensation in cases such as are here under consideration.

Also, the above proposition, that an owner that is charged with notice that he is subject to be deprived of the use of his property by the exercise of the power of eminent domain is not accurate. There is no law that the property owner is charged with such notice, as if the Government possessed powers of confiscation to which the citizen must submit. The Fifth Amendment is not a grant to the sovereign to take property. That right is said to have been claimed by the sovereign from early times. The Fifth

Amendment, "Nor shall private property be taken for public use without just compensation," is a denial of the power of confiscation and is to be liberally construed in favor of the citizen. Occasionally courts and judges have also intimated that losses for which compensation must be paid under the Fifth Amendment and the rules for computing them, are matters for the legislature. This Court has held from an early time that those matters are not for legislative determination; that it would be unseemly to allow the legislative or political body that is condemning the property to fix or define the rules for determining the compensation that should be paid for that which it takes. The determination of just compensation is a judicial function, and in that determination, of course, must be considered the elements that go to comprise just compensation.

The citizen has no voice in when or where the power of eminent domain shall be exercised. The condemnor alone initiates condemnation proceedings. It selects what is to be taken, when it is to be taken, and the length of the period and the extent of the taking. It would be a complete frustration of the Fifth Amendment to allow the Government or Congress to say how much it shall pay for what it has taken; that it will pay for this but not for that. As well not have the Fifth Amendment if that were the law.

Many of the principles we have just recited are found in *Monongahela Navigation Company v. United States*, 148 U. S. 312, 37 L. Ed. 463 (1892).

In that case Congress authorized the condemnation of some locks and dams and expressly provided that nothing should be paid for the franchises. The argument was made to this Court that since the Government did not need the franchises, Congress having power itself to create any needed franchise, the franchises of the company need not be paid for. This Court repudiated the view and said,

(Page 327 U. S.), "It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be *the rule of compensation*. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." (Italics added).

Many of the erroneous theories of the Government and of some of the cases relied on by it are rejected in the Monongahela case, and we take the liberty of quoting it somewhat at length, since so far as we know, the principles therein announced have never been departed from by this Court and are quite appropriate herein:

> "The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the Government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.
>
> "In the case of *Sinnickson v. Johnson*, 17 N. J. L. 129, 145, cited in the case of *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. 13 Wall, 166, 178 (20: 557, 560).

it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner v. Newburgh*, 2 Johns. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to everyone. It in nowise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

"But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature it was well said by Mr. Justice Bradley, speaking for the court in *Boyd v. United States*, 116 U. S. 616, 635 (29: 746, 752). 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of

the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*

"The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire Amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

* * * "And the question of just compensation is not determined by the value to the government which takes, but the value to the individual for whom the property is taken." (Page 343 U. S. Reports).

"The war or the conditions which followed it did not suspend or affect these provisions (the Fifth Amendment). The owner was entitled to the full money equivalent of the property taken, and thereby to be put in the same position pecuniarily as it would have occupied if its property had not been taken (citing authority). The ascertainment of compensation is a judicial function, and no power exists

in any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard. (Pages 343, 344). * * * The owner was entitled to what it lost by the taking." *United States v. New River Collieries Co.*, 262 U. S. 341, 343, 344, 345, 67 L. Ed. 1014, 1017, 1018.

"Any arrangements that the Government may have made with the owner to pay what might be due to the tenants, or some of them, did not affect the claimant's rights." *A. W. Duckett & Co. v. United States*, supra.

This Court has recognized that earlier cases sometimes construed the constitutional provisions within such narrow limits as to result in confiscation and inadequate compensation. *Jacobs v. United States*, 290 U. S. 13, 18, 78 L. Ed. 142, 144. "Suits brought to enforce the constitutional rights to just compensation are governed by the later decisions which are directly in point," and on Pages 16 and 17, "The suits were thus founded upon the Constitution of the United States. The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements. * * *" * * * "Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. * * *

"The compensation to which the owner is entitled is the full and perfect equivalent of the property taken (Monongahela case cited). It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Seaboard Air Line R. Co. v. United States*, 261 U. S. 299, 304, 67 L. Ed. 664, 669.

(B) Just compensation may be measured in other ways than by the fiction of a "market-value" that doesn't exist.

In Brooks-Scanlon Corporation v. United States, 265 U. S. 106, 68 L. Ed. 934, the Court announced this rule as a proper measure in determining the value of the contracts which were expropriated: "That is, the sum that would, in all probability, result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." (Page 124 of U. S.).

Many federal Circuit Courts and state courts of last resort have discussed the question of just compensation in connection with market value when applied to tenancies and other interests where the general rule of market value is difficult of application, and have indicated that the fact that a tenancy or other property taken by eminent domain may have no market value in the general sense of the term, does not deprive the tenant or the owner of the right to compensation. 18 Am. Jur., Sec. 296, Page 939; *United States v. Wheeler*, 66 Fed. (2d) 977, which was later referred to with approval in *United States v. Chicago B. & Q. R. Co.*, 82 Fed. (2d) 131, certiorari denied, 298 U. S. 690, 80 L. Ed. 1408; *Karlson v. United States*, 82 Fed. (2d) 330; also, *National Laboratory and Supply Company v. United States* (E. D. Pa. 1921), 275 Fed. 218); *Des Moines Wet Wash Laundry v. City of Des Moines* (1924), 197 Iowa 1082, 198 N. W. 486; three Pennsylvania cases, *James McMillin Printing Company v. Pittsburgh, C. & W. R. Co.*, 216 Pa. 504, 65 Atl. 1091; *Shipley et al., v. Pittsburg, C. & W. R. R. Co.*, 216 Pa. 512, 65 Atl. 1094; *Iron City Automobile Company v. Pittsburg*, 253 Pa. 478, 98 Atl. 679; *Blincoe v. Choctaw, O. & W. R. Co.*, 16 Okla. 286, 83 P. 903 (1905); *Bales v. Wichita Midland Valley R. Co.*, 92 Kan. 771, 141 P. 1009.

The court in the McMillin Printing Company case, supra, quoted in the *Iron City Automobile Company v. Pittsburg*, supra, on the general subject of market value with reference to the lease said:

"But market value is an unsatisfactory test of the value to a tenant of a leasehold interest. It is really no test at all, because a lease rarely has any market value. Generally, it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensation, is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

The Iowa Court discussed the same matter in Des Moines Wet Wash Laundry and both the Iowa and Pennsylvania Courts, as well as other courts, hold: "It is generally held in condemnation proceedings, the property being taken in invitum, that the controlling principle is analogous to a vendor and vendee and not between the landlord and the tenant." (Des Moines Wet Wash, supra, page 489 of N. W.). This thought is expressed as indicated above in the Brooks-Scanlon case and also in the General Motors case as follows: "2. Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of

moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage, but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease."

In the case of *De Laval Turbine Co. v. United States*, 284 U. S. 61, 76 L. Ed. 168 (1931), this Court had under consideration the cancellation of contracts requisitioned by the Government. In the Court of Claims, innumerable items were described as involved in the cancellation, including idleness of machines, operators and tools, drawings, moving of equipment, and the like. This did not present any insurmountable obstacle to the determination of just compensation; and in that case the company knew that the contract was subject to cancellation by the Government. The expenditures resulted from a temporary taking of the contract by the Government. This Court said that the cancellation was a "lawful act under the power of eminent domain." The value of the contract at the time of its cancellation was allowed; "that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy. * * * The fact that the contract, if carried out, would be profitable is one of the circumstances which naturally would be considered by one seeking an assignment of the contract, and must be given its proper weight in fixing just compensation."

The amount of a bonus a tenant is reasonably obliged to pay to obtain new space upon being compelled to remove

from his premises under the power of eminent domain as well as moving costs, is proper evidence to be proved in considering the value of the premises taken. *United States v. Katz Drug Co.*, 150 F(2d) Adv. Opin. No. 5, p. 681 (8th Circuit, 1945).

The foregoing authorities justify the conclusion of the Circuit Court in the case of *United States v. Wheeler*, supra, that for the road flooded which had no market value, it was not just compensation to pay only for the land actually flooded, but that the township must be made whole from money loss. "When the ordinary measure of loss (decrease in actual or assumed 'market value') cannot be applied, as here, then 'whatever is necessary to be considered in order to determine what is an equivalent for the appropriation of private property is germane to the question of compensation'." (Page 984)

And in the Chicago B. & Q. R. case, 82 Fed. (2d) 131, supra, the Eighth Circuit Court speaks of compensation as damage, as does the Monongahela case in this court, supra, at pages 136-137, as follows:

"Unless specific items of damage present here are compensable, then this case is wholly out of line with the principles of fair and just compensation laid down by this court and by the Supreme Court in cases too numerous to mention."

The court concludes, as it justly could from the citations we have already given, that to the word "taken" there must be added the words "or damaged" as follows: (Page 139)

> "As already forecast, to the word 'taking' there has now been added by almost unanimous decision, bottomed on changes in the organic law, or by statutes, *or by judicial interpretation in the later cases*, the words 'or damaged.' This modern trend, which clearly

comports with fairness and justice, and without which that *just compensation* guaranteed by the Constitution cannot be accomplished, is plainly referred to and conceded by the Supreme Court in the very late case of Jacobs v. United States, 290 U. S. 13, wherein it is said: 'Suits brought to enforce the constitutional right to just compensation *are governed by the later decisions* which are directly in point.'" (Italics added).

That Circuit Court also holds that such items as were introduced in evidence in the cases at bar were not consequential damages, but are direct and proximate. And sometimes even when they are erroneously defined as consequential damages, they have been allowed. *Blincoe v. Choctaw*, supra.

The Eighth Circuit Court says in the Chicago B. & Q. R. Co. case, supra, at page 136:

> "But obviously, confusion is found in the cases, and this confusion has seemingly misled learned counsel for appellant. This confusion comes, we think, from a failure to distinguish as to the origin of the independent cause. If the latter arises from the act of another person and so could have been obviated or prevented, or from natural causes acting abnormally, e. g. acts of God, damages arising from the original act are not recoverable, for they are consequential merely, and not proximate. *But if the hurtful result shall arise from the original act done, perforce, or plus the normal operation of well-known, uncontrollable and immutable laws of physics and natural forces, we are incapable of either following or agreeing to the distinction.*" (Italics added).

The Government is in error and it is a misnomer to designate such items as moving costs and the like as consequential damages. Here they are not consequential. But no effort was made to recover them as damages and the

verdicts do not cover them. While it may be that loss of profits and loss of business are too remote and thus consequential, we are not concerned with that question in these cases since there was no such evidence here. Even upon this question there is respectable authority that such matters as loss of business and loss of profits are sometimes relevant. "Loss of business profits as such is not allowable, * * * but in default of more direct evidence of sale value, present value (i. e. as of the time of taking) of clearly to-be-expected future earnings, may be considered." *Brooklyn Eastern Dist. Terminal v. New York,* 139 Fed. (2d), 1007, 1013. (Second Circuit Court of Appeals, January 6, 1944). We shall later comment on the Government's criticism of the Chicago B. & Q. R. Co. case at page 30 of its latest brief.

The Seventh Circuit Court of Appeals followed the Eighth Circuit Court, in the case of *United States v. Chicago B. & Q. R. Co.*, 90 Fed. (2d) 161, wherein the Government contended that it could be held liable only for that which it actually physically took, and that any other damage resulting from this taking was consequential. The Seventh Circuit Court, however, rejected the Government's contention and allowed recovery for damages which proximately resulted from the taking. * * * "we are convinced that all the damages covered by the verdict were proximate, and were not speculative, consequential, or remote." (Pages 168, 169). These damages included losses from backing up of water twenty-eight miles (Page 167) above the dam located on the land actually taken and necessitated the railroad raising and protecting its embankment and raising and extending its bridges and other matters similar to those occurring in the earlier case in the Eighth Circuit Court.

(C) *The trial court's instructions.*

In view of the novelty of the situation created in the present case, it is quite remarkable that the trial court instructed the jury as accurately as he did. Most, if not all, of the principles promulgated in the later cases, including the General Motors case, were covered by the trial court. The Government complains that the court left it to the jury to define "just compensation." This is an incorrect assertion. The court specifically called attention to all the elements present in the case, the character of the tenancies, the length of time tenants had occupied their premises, the kind of businesses conducted, what they had been required to do and expend as a result of being dispossessed, and told the jury that all these things should be taken into consideration. The court said, with reference to just compensation, "Those words are very broad in their meaning. The Constitution of the United States and the Amendments to it fortunately use words as a rule of general meaning.

"Now what is 'just compensation'? It cannot be defined by me, or any court, so that it would have anything like universal application. 'Just compensation' means speaking generally, that the owner who has been deprived of private property for public use by the Government shall be compensated in such measure that will constitute 'just compensation.' Not technical compensation, not compensation along any particular line limited or unlimited, but compensation.' " (R. 573).

The court also told the jury that the tenants might be better off in their new quarters than they were in their old. If they were they should get nothing in this case (R. 572-573). In fact, under the court's instructions and in view of the General Motors case, we were the ones who were injured and not the Government because, after allowing

all the evidence of our moving, increased rent, and loss, the court said with reference to these matters, "That cannot be the measure of the rights of recovery. That is not 'just compensation.'" R. 573).

The court specifically told the jury that the Government was not required to pay our rent for any definite period or the difference between our rent and the rent we were paying (R. 573). We never asked to have the Government pay our moving costs or our rent. We never asked for anything more than the value of our occupancy, and we didn't get that. The jury followed the court's instructions and the Government was the beneficiary. It is unfair to single out one particular phrase from the court's instructions and charge that the court left it to the jury to define just compensation. Even had he done so, there is authority to justify it. That is exactly what the Iowa court said in the Des Moines Wet Wash Laundry case, "The term 'just compensation' as found in Constitution and statute has no technical or purely legal significance. The words express in a general way the meaning intended." (Page 488).

The federal district court in *National Laboratory and Supply Co. v. United States*, 275 Fed. 218, supra, said the same thing: "These words have no technical or purely legal significance. What do they mean? They are in themselves expressive of the meaning intended."

(D) *"Even under a "market value" measure the verdicts herein are not for more than the tenants were entitled to under the Fifth Amendment.*

When we read in some of the cases that the condemnee, in spite of the hardship to him, must bear the burden of loss actually suffered by him through the condemnation be-

cause of some supposed "rule," we may be certain that in those cases "just compensation" has been denied.

Some cases refer to ascertaining the value of the "unexpired term" of a lease. Our term was a legal occupancy with a right to stay indefinitely, subject to dispossession only by the landlord. To say that such an occupancy has no value because there is no unexpired term is just not true. It is disproved by the facts. There was an unexpired term which was taken. We had been given no notice to vacate. The landlord wanted the tenants to stay and the tenants wanted to stay. Their businesses were built up without leases around this location for from fourteen to twenty-six years. It is proper here to measure the future by the past. We all had unexpired terms which were taken. We also had a present right of occupancy which was destroyed and taken.

There really is no difficulty in ascertaining just compensation in our situation or in any situation we have encountered in an examination of the cases. Using the tests announced, it seems to us that we might even adopt the "market value" fiction. A person desiring to occupy the Grocer Printing Company premises and willing to pay Mr. Grimsdell to vacate would be Mr. Grimsdell's market, even though he was the only person to entertain such a desire. A vendor and vendee discussing the purchase of such an occupancy would do exactly as indicated by this court in the General Motors case. The prospective purchaser would be willing and desirous of taking the premises, and Mr. Grimsdell would be willing, upon being fairly compensated, to vacate. The only question remaining would be what would reasonably enter into such a transaction. The purchaser knows that there is no lease, but that the landlord is willing for him to move in and occupy the premises, to stay and to establish his business there. He knows that Mr. Grimsdell

must find another location. If the rent is higher, the location less desirable, the heat and light additional charges, those matters would all be considered. The purchaser would take into consideration Mr. Grimsdell's facilities and equipment and would realize that they had to be moved. The reasonable cost of moving them and reestablishing them would be considered. Mr. Grimsdell's occupancy being terminated, there would be no consideration for any other costs than moving him and establishing him in his new location. If some of his property was damaged or depreciated by the removal, that would be considered. None of these items in and of themselves would constitute just compensation, but all of them are relevant in placing a value upon the occupancy. Reasonable men in making a deal for one to vacate so that the other could occupy the property, would naturally and logically take into consideration what the mover would lose in the transaction, what his damage would be, and would consider a sum which would restore him the money lost in consequence of his property being vacated. All of these matters would be taken into consideration by the purchaser in fixing the value of Mr. Grimsdell's interest in the property.

This Court in the General Motors case says, "In the light of these principles it has been held that the compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken." The interest taken is the occupancy. To put Mr. Grimsdell in as good position pecuniarily as he would have occupied had his property not been taken would require taking into consideration those items of cost and expense that necessarily and proximately result from the taking. The owner's out-of-pocket expense in vacating, reestablishing himself, his increased cost of doing business, if any, and all matters rele-

vant to determining the cost to him resulting directly and proximately from the taking, are matters that can readily be ascertained.

It is quite impossible to enumerate exactly what the items would be in every instance, but they can readily be ascertained in every case by an adequate and proper investigation. That is one reason why the ascertainment of those things should be a judicial question, a question for a court hearing the specific items of evidence in each separate case, rather than a legislative question where the legislature would have to speculate in advance on theoretical hypotheses that might or might not exist.

In a long-term tenancy where a short-term is carved out of it, if the tenancy was not terminated by the condemnation, of course, the relocating of the tenant after the termination of the short-term condemnation would naturally be considered in a deal between vendor and vendee or two fair-minded individuals bargaining for such an occupancy. If the tenant was under no obligation to return and did not desire to do so, then, of course, the relocating expenses would not enter into just compensation. In the cases at bar, it was assumed that none of the tenants would return to these premises, and consequently, no evidence was offered of anything except their costs of removal and re-establishment, and that evidence only for the purpose of determining the value of their occupancy.

The owner, however, Mr. Richards, had his case gone to a jury and a lease not been negotiated would have been in an entirely different position. The Government has completely altered the interior of his building. Certainly he would be entitled to have his premises restored to their original condition, if he desires. If he does not, it would be easy enough for him to so say in the condemnation trial, and that matter can be properly considered and determined there.

It is not for the Government to say, "You must take your premises back in such a condition as we desire to return them." The Government would have been required to put Mr. Richards in as good position financially as he would have been had his premises not been taken. That would require not only the payment of the rental for the space actually occupied, because occupying space even though unoccupied before is a taking of it, but would require some consideration for the restoration of his property and the damage he sustains from the loss of tenants who are not going to return.

Because in a given case determining just compensation may involve many considerations does not excuse the Government from making compensation. The Government has the choice of condemning the whole or any part, of fixing the term of its occupancy, of determining the manner of its procedure. The tenant and owner have no voice in these things. And having made its election of procedure, term of occupation, and interest to be taken, the Government cannot be allowed to escape paying just compensation upon the plea that it has created a condition that requires the application of rules of evidence different than required in the condemnation of the fee. In fact, in condemning the fee, all matters of value would be considered, not the bare value of so many square feet or so many acres of vacant ground, but the value of the ground, taking into consideration its use, its location, its reasonable future use, the business being conducted, the buildings, and all the other matters that enter into consideration in fixing value between a fair purchaser and a fair seller.

Congress did not authorize the Government to go about the country throwing people out of their premises without compensation to those dispossessed. If the exigencies of war prevented a proper consideration of what should be

done and required such expedition as to admit of no adequate investigation and negotiation, Congress took care of that situation by authorizing the condemnation of anything necessary, and knew by granting that authority, that the citizen was protected because the exercise of the power of condemnation requires the payment of just compensation. The very fact that the Government chose eminent domain as the means of acquiring property forecloses the Government from arguing that it need not pay for it. By choosing condemnation, the Government admits that the thing taken it property for which it is required to pay the condemnee what he loses by the taking measured by standards that can readily be applied.

In our cases we have been paid nothing, offered nothing. We have never even been considered. This Court has never authorized or sanctioned such a course of procedure. Evidence received in these cases was competent and relevant in determining the value of the tenancies, although the jury under the trial court's instructions disregarded much of it. The verdicts do not award more than just compensation.

The *General Motors* case does follow basic principles of a long line of decisions of this Court. The trial court was guided by these principles and we submit correctly applied them to the facts herein. This Court from early times has consistently upheld the rights of citizens under the Fifth Amendment. It seems to us the Circuit Court was right in believing that "the basic principles announced in the General Motors case are not confined to the narrow facts involved therein. We are convinced that the principles announced therein are controlling under the facts as presented here. Otherwise, the Government would in this case convert the Fifth Amendment from a guarantee of just compensation into an instrument of confiscation."

GOVERNMENT'S BRIEF

We have read all the cases cited by the Government in its brief on Petition for Certiorari, and most of those in the latest brief. A large number of them are decisions of trial courts and of foreign jurisdictions, which are hardly authoritative on the United States Constitution. It seems to us the trial court in our present cases gave effect to the protection of the Fifth Amendment so as to accomplish its purposes, and that some trial courts cited by the Government did not comprehend the scope of its guarantees. Not one case cited by the Government would justify a reversal of the cases at bar. Our cases are essentially different in their facts. Many of the Government's cases may not be considered since they are in conflict with applicable decisions of this Court. Many of them are also against the Government's claims here. It is not feasible within the limits of a brief to discuss them all, but we shall later make specific reference to some of them.

The Government presents two questions:

> "1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than the tenants' existing leases are entitled to prove moving costs and consequential damages resulting from the enforced removal as evidence of the value of their interests.
>
> "2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property."

We believe that neither question accurately propounds propositions present in our cases.

Government Question I

The building the tenants were occupying was not condemned by the United States for temporary use; it was not condemned by the United States at all. Our premises were not condemned for a period longer than any of our existing leases. We did not offer to prove any consequential damages, nor was any evidence received of consequential damages in the sense that that term may be accurately applied in these cases. What the United States did was to evict us by an order to show cause under a petition that requested a seven and one-half months' renewable lease. Every one of us could have and would have remained in the property much longer than that. The Government never completed those proceedings. After it evicted us it actually entered into a negotiated three-month renewable lease for the building. Its theory advanced at the trial and in the Circuit Court, and apparently abandoned in this Court, that all it had to do was to find the value of the landlord's interest, pay that into court, and that ended its responsibility in the matter, was obviously inapplicable to the facts in our cases. The value of the landlord's interest had nothing to do with us. Nothing was taken from him. He and the Government fixed his compensation. That would not bind us, we were not parties to it. It would not determine the value of our occupancy to determine what was a reasonable monthly rental the landlord should receive for the empty Terminal Building. As a matter of fact, the Government misstates the rule. In those instances where the value of the premises taken was fixed as a whole for division among the several interests, the value of the landlord's interest and the tenants' interests were separately computed and the whole comprised the value of the property taken. This is demonstrated in cases cited by the Government itself. For example, in the

case of *Silberman v. the United States*, 131 Fed. (2d), 715, the Circuit Court expressly held that a tenant had a right to be heard; that he had a right to compensation for his interest, but since the lessee had not been substantially prejudiced by being refused permission to appear and offer evidence the case would not be reversed. It was not necessary to reverse the case because the award was sufficient to cover the tenant's interest, and if payment of the tenant's interest did not leave enough also to pay the landlord, that was the landlord's fault for not offering evidence of the value of both interests.

In our cases, not only did we not know how long the Government would be in possession of the landlord's building, we did not know whether it intended to restore the building or whether the landlord wanted it restored. In fact, we knew nothing about the landlord's ideas or status. He had no reason to offer any evidence. He was out of the case. The Government put the landlord out of the case by making a lease with him; and thus made moot the value of the landlord's interest. The Government cannot defeat our recovery by making a lease with the landlord.

In one of the cases cited by the Government, *United States v. Inlots*, 26 Fed. Cases, No. 15441A, Page 492, one of the tenants appealed to this court, the appeal being *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449, supra, and this court approved the determination of the landlord's and the lessee's interests separately. The jury found and returned separate values of the estates of the lessor and the lessee. The estates of the landlord and the lessee here were determined separately, one by negotiation and the other by a jury. The Government's Question I is irrelevant here.

Government Question II.

The Government's second question again assumes that there was condemnation of the leased property unless by the term "leased property" it means our tenancies. If it means our tenancies, then the Government's own use of language answers its own question. By using the phrase "condemnation of the leased property by the United States," the Government concedes that we had leases which were condemned. A lease is property, and, of course, it must be property or there would be no need to condemn it. Having selected and used the method of condemnation to secure the property, there arises an absolute obligation to pay just compensation. The jury were not left to fix compensation based upon such indefinite period of time as the jury should conclude the tenants might continue to occupy the property. The Court instructed the jury in positive, definite language (R. 569-574). It is not fair to single out a phrase or a sentence and hold that up as the sum total of the Court's instructions, which in their entirety convey a meaning entirely opposite than that attributed to them by the Government. The Government has offered, and at the trial did not offer, any instructions it considers proper. It would be interesting to have the Government propose for analysis instructions herein that it would consider proper and specify under which of its many theories. When all of the instructions are read as a whole, it is evident that the Government was not injured by them.

GOVERNMENT'S ARGUMENT I. (Page 15)

"THE TENANTS IN THIS CASE WERE NOT ENTITLED TO PROVE EXPENSES INCURRED AS A RESULT OF BEING REQUIRED TO MOVE OUT OF PREMISES CONDEMNED BY THE GOVERNMENT AS EVIDENCE OF THE VALUE OF THEIR TENANCIES.

"(A) *The expenses incurred by a tenant in moving removable fixtures and personal property from premises*

condemned is not to be considered in determining just compensation when the tenant's entire interest in the property is taken." (The foregoing are the Government's statements.)

Under this heading the Government still argues that it condemned the Old Terminal Building for a period expiring June 30, 1945, which it did not. It also admits that throughout the case it objected to consideration of moving expenses for *any purpose* (P. 15). This objection was also invalid. The Government says that the Circuit Court conceded that "the lease acquired by the government was for a term extending beyond the expiration of the lease owned by each of the tenants, with the exception of the lease owned by the Independent Pneumatic Tool Company, and possibly with the exception of the lease owned by the Petty Motor Company." (Government's Brief 15). That quotation from the Circuit Court's Opinion is the statement by the Circuit Court of the Government's contention, the same there as here. The Circuit Court did not agree with it. The Circuit Court said in answering this contention, "The basic principles announced by the General Motors case are not confined to the narrow facts involved therein." The term of the lease acquired by the Government did not extend beyond the expiration of the leases of any of the tenants.

At pages 16 and 17 of its brief, the Government apparently argues that the *General Motors* case announced principles that are exceptions to and different from principles formerly established by this Court. We do not understand that the General Motors case holds that just compensation is different in one class of condemnations from just compensation in another class of condemnations. Nor do we believe as the Government contends at another place

in its brief (Page 30) that there is "an exceptional measure of compensation" in railroad cases as distinguished from any other cases. As we read the decisions of this Court, including the *General Motors* case, the Court long ago interpreted the Fifth Amendment as it should be and must be interpreted. In the *General Motors* case it simply applied those principles, which the Circuit Court herein said are basic, to the facts in that case. Obviously where there is no market value for property taken under eminent domain, it is impossible to apply the market value rule. That fact, however, does not require the abandonment of the Fifth Amendment and a denial of compensation to the person whose property is taken. Nor is compensation denied in such cases because this Court in other cases where it was possible to do so has applied the market value theory. This Court has always said the Fifth Amendment *must* be enforced. And since the Fifth Amendment *requires* compensation to be paid, this Court from time to time has announced applicable rules for determining just compensation.

We do not understand the *General Motors* case to hold that if the Government had taken the entire term of the General Motors the company would thereby be precluded from offering evidence of its expenditures and moving costs as evidence of the value of its lease. Had the entire term of the General Motors been taken, it would have been deprived of the right to occupy the premises as it had improved them for its occupancy; the time of its moving would be accelerated, not by virtue of the expiration of its lease, but solely by the exercise of the power of eminent domain. Because the landlord could require the General Motors to vacate at the expiration of its term, does not give a condemnor or anyone else the bare right to require it to move before the expiration of that term.

The argument that the tenant had to move anyway at the conclusion of its term, and thus cannot have its moving costs considered in valuing its term merely because it has been required to move earlier and thus incur only the same expense it would later be required to pay, overlooks the fact that the earlier removal is required under and only by the power of eminent domain. Because the entire term is taken of a lease of property specially equipped by and for the lessee, which consequently would generally eliminate a market value for it, should not thereby deprive the lessee of the right to have considered in fixing the value of its tenancy the elements that go into the making of that tenancy valuable. Certainly the cost of moving out and re-establishing would enter into any fair negotiation between a vendor and a vendee whether the term "taken" was for the entire term of the lease or merely for just a part of it. If it were otherwise, the condemnor could fix the amount recoverable almost at will. This the Court pointed that out in the *General Motors* decision and said:

> "If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing 'just compensation' * * *."

There is no attempt to secure refunding of moving costs or the value of fixtures and like items, but merely a consideration of these things in determining the value of the tenancy for which there is no other method of fixing value.

So, we do not understand the *General Motors* case to hold that the Government by fixing the term of its occupation either beyond or less than the term of the lease condemned can deprive the owner of just compensation for that which is taken from him. And, obviously, where there is no established market value, as there is not in

thousands of instances where property is specially equipped or located for the tenant's particular business, the cost of moving out and re-establishing are elements any fair-minded man would consider in fixing the value of the tenancy. The condemnor selects the object of the condemnation, has the right to take it or leave it and knows in advance the accompanying requirements as to compensation. No advantage is taken of the condemnor and no harm is done him, since he knows before he takes the property the matters that will be considered in fixing compensation for that which is taken. Congress recognized that it might be more economical to purchase property for temporary occupation than to condemn it (footnote 16, page 32, Government's brief), and never intended that because business concerns occupied their premises under short or long term leases they were to be called upon to bear alone the burden of loss that should be borne by the entire public because it would be difficult if not impossible to determine just compensation without considering removal and re-establishment costs.

B. (Page 17) "Even a tenant whose entire interest is not taken when the Government condemns property for a temporary term cannot have consequential damages other than moving expenses resulting from the taking considered for any purpose." Under this heading at page 17 the Government asserts that the court below held that whenever less than fee simple title is condemned the rule denying recovery of consequential damages does not apply. We find no such holding in either of the lower courts. Consequential damages were not considered in our cases. Under the same heading and also under the same subdivision of its Summary of the Argument, page 11, the Government points to the fact that the lower court received evidence concerning the tenants' unwillingness to move. The evidence of the tenants' unwillingness to move was offered

only for the purpose of showing that their occupancy was not temporary or transient, and not for the purpose of having that matter enter into the valuation of the tenancies. On pages 12 and 18, the Government classifies consequential damages as loss of good will and injury to business. Both were excluded from our cases. We do not know why the Government makes in the same category the constant reference to consequential damages and impropriety of proof of good will and injury to business in its complaints against the lower courts, since no scintilla of evidence of loss of good will or injury to business was received or considered in these cases. Throughout its entire brief, the Government reiterates its reference to consequential damages, the evidence of increased rents, and the like, with never a word concerning the Court's instructions to the jury, particularly the express statement that the jury were not required to award increased rents, moving costs and the like because that was not just compensation.

On page 19 the Government inferentially charges that evidence of reduced net profits, because of increased overhead expenses, was considered in this case, and that the trial Court instructed the jury that the question was as to whether the tenants were better or worse off in their new quarters. Both charges are wrong. The Court specifically said from the beginning that just compensation was not to be determined by the cost of moving, the extra rent, and the like, and in his instructions to the jury expressly said that the tenants might be better off in their new quarters, and if they were they could recover nothing (R. 572, 573).

The Government cites numerous cases under subheadings A and B of its Argument No. 1. A detailed discussion of them is obviously impossible in this brief, but random selection of almost any of them will indicate that

they do not support *any* contention made by the Government herein. For example: *Mitchell v. United States*, 267 U. S. 341, 69 L. Ed. 644, is not limited by the decision in the *General Motors* case. The *Mitchell* case involved the taking of the fee. The Government was asked to pay for destroying a business. We made no such request, and none of the questions involved in the *Mitchell* case are involved here. In that case, however, it was declared that in fixing value it was proper to consider the special value and adaptability of the land and the particular business conducted thereon by the owner. Thus were included the very elements that were also considered in our case in fixing the value of our premises.

In *United States v. Miller*, 317 U. S. 369, 87 L. Ed. 251, 254-5, the Government leaves out this quotation from that case, "Where, for any reason, property has no market resort must be had to other data to ascertain its value."

Joslin Co. v. Providence, 262 U. S. 668, 67 L. Ed. 1167, involved only the constitutionality of a Rhode Island statute which expressly required payment of moving costs within a certain area. The contention was made that the statute was unconstitutional, and this Court held that it was not. In that case the Legislature, instead of attempting to *limit* the amount of just compensation, made it clear that it intended that just compensation should *include* moving costs. There is nothing in that case contrary to the decision of the Circuit Court herein.

Omnia Co. v. United States, 261 U. S. 502, 67 L. Ed. 773, is authority for the proposition that an executory contract for steel was not taken by the Government upon requisition of the steel company's entire production. That case has no bearing upon our cases. We did not ask for anything for loss of contracts.

In the case of *Bothwell v. United States*, 254 U. S. 231, 65 L. Ed. 238, the trial Court allowed the claim for hay, but denied the claim for destruction of business and depreciation of cattle where the fee of lands was condemned. The value of the property, however, was fixed with consideration of the kind of a business being carried on upon it.

On page 20 of its brief, the Government cites some 24 cases as authority for the proposition that items considered in the *General Motors* case had theretofore been held inadmissible as being speculative and consequential in nature and having no bearing on market value. While the *General Motors* case calls attention to the fact that in the condemnation of the fee certain elements are not considered in fixing compensation, it must also be remembered that in arriving at just compensation where the fee is taken, every element that properly goes into a consideration of value is received, such as the use being made of the property, the highest use that can reasonably be made of it, the improvements on it, its location, its adaptability for particular uses, any special value it has, and all elements that go into a fair valuation; also included is damage, depreciation and destruction of other property necessarily incurred in connection with the property taken. That is to say, in the condemnation of the fee, the courts have arrived at a formula that can be followed in most instances in arriving at a proper value. It is not necessary to depart from that formula in most cases. However, this Court has also recognized that even in some fee condemnation cases it may not be possible to apply that general formula, and "where, for any reason, property has no market resort must be had to other data to ascertain its value; and even in the ordinary case, assessment of market value involves the use of assumptions which make it unlikely that the appraisal will reflect true value with nicety." *United States v. Miller*, supra. So, in the *General Motors* case,

and other cases not involving the condemnation of the fee, questions arise which are not present when the fee is taken. In other words, it is proper to consider in such cases elements that it is not necessary to consider where the fee is condemned. And even in fee condemnation, where market value is not applicable, whatever is *necessary* may be considered in order to determine what is equivalent for the appropriation of private property. Because this Court in the *General Motors* case said that it did not desire to depart from the established rule in cases where the fee is taken, does not justify the assumption that a different rule applies in cases of condemnation of leases. As we read the *General Motors* case, it holds that there are elements involved in lease condemnations that are not involved in fee condemnations, and consequently a different method may be used to determine the same result—just compensation. The evidence of moving costs and the like is not received as an item of damage or cost which the Government must repay, but only as an aid in arriving at the value of the thing taken. Usually in fee condemnations it is not necessary to receive such evidence in order to determine the value of the fee. In some of the cases cited by the Government, the attempt was made to offer evidence of loss of business profits and the like in connection with the condemnation of the fee in order to secure *payment* for these items, *in addition* to the value of the land taken. Such evidence for such purposes would be inadmissible in cases involving leases. In condemnation of leases, evidence of moving costs, destruction and depreciation of fixtures and other personal property is not received in order that those costs may be repaid, or paid in addition to the value of the property taken, but in order to aid in determining the value of the lease. In the end it comes to the same thing, whether a fee or a lease is concerned: the effort is to formulate methods for determining the value, and if the

so-called "market value" theory is not applicable then the condemnee is not denied compensation, but *another* formula is adopted to determine value. We have yet to have pointed out to us *anything* in our cases that was offered in evidence that would not fairly be considered in fixing the value of our lease in a fair transaction between a willing vendor and a willing vendee.

As we read them, the great majority of the cases cited by the Government on page 20 have no application to the facts in our cases. Of course, those like *Gershon Bros. Co. v. United States*, 284 Fed. 849, are directly contrary to the *General Motors* case; while others announce principles supporting our views here and against those advanced by the Government. Examples of such cases are:

Pacific Livestock Co. v. Warm Springs Irrigation Dist., 270 Fed. 555, wherein the 9th Circuit Court said at page 559: "There may be circumstances under which the expense of removing personal property from land which is sought to be condemned is a legitimate item of damages. But the damages here sought to be recovered on account of the hay were too conjectural and uncertain to form the basis of recovery at the time of the judgment of condemnation."

In *Futrovsky v. United States*, 66 Fed. (2d) 215, the Court said the record was "insufficient to properly present the questions raised." It called attention to the fact, however, that the owner had been allowed to offer all the evidence he desired concerning his property specially equipped for refrigeration purposes, the installation, metal and cement that went into the room, "which evidence indicated a net reproduction cost of $4,666, which went to the jury along with the other evidence, and which must be taken as having duly entered into their verdict as rendered."

In *Re Widening Third Street in St. Paul*, 176 Minn. 389, 223 N. W. 458, the Court calls attention to the fact that condemnation is similar to a transaction between private parties: if the private party receives full value for his property he removes at his own expense. It follows that if it is necessary to figure the cost of removal in order to determine the value of the property, the owner still pays his own cost of removing, and that cost is only one of the elements to be considered in determining the value of the property. It is not added to the value of the property, but is merely a guide to determine what is that value.

The two Missouri cases indicate some uncertainty as to what exactly is the rule in Missouri. For instance, *Springfield S. W. R. Co. v. Schweitzer*, 173 Mo. App. 650, 158 S. W. 1058, cites other Missouri cases where removal costs were allowed; and in *St. Louis v. St. Louis I. M. & S. R. Co.*, 266 Mo. 694, 182 S. W. 750, the Court concludes that there should be deducted from the market value of fixtures removed the amount by which they are diminished by the necessity of removal and installation elsewhere.

The cases cited by the Government on page 22 of its brief are not in point, since the trial court did not disregard the standard of a willing seller and substitute for it a personal standard of value. The Government apparently believes that to the words "willing seller" should be added "at whatever price the buyer wants to pay." The test is a willing seller and a willing buyer in a fair transaction, "taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining" also if market value "is lacking, the market value must be estimated." *Olsen vs. United States*, 292 U. S. 246, 257, 78 L. Ed. 1236. (Partially quoted pp. 21 and 22). It is not a question of whether one *wants*

to sell or whether one *wants* to buy. If a person *wants* to sell, the question of how much he will sell for depends upon how badly he wants to sell; and the same is true as to the use of the word "want" in connection with the buyer.

Under subdivision C, pp. 23-28, the Government devotes itself to the Independent Pneumatic Tool Company lease. Of the cases cited by the Government in its brief, almost half of them are cited in connection with this one tenant. This company actually spent $615.58 in improvements in its premises in the Terminal Building, all of which it lost upon removal (R. 199, 207). This sum is wholly apart from the moving costs from the Terminal Building. These expenditures have nothing to do with the landlord and were no part of his allowance from the Government. The verdict for this company was $600.00, and in view of the factual situation here, hardly justifies the prominence it receives in the Government's brief. Under the facts here the case is not a precedent. None of the cases cited by the government has a similar factual record. We do not know whether the Government has abandoned its position regarding this tenant in view of this footnote on page 12 of certiorari brief. "In view of the fact that the settlement made with the landlord in the instant case did not require the owner to indemnify the Government from the claims of lessees (citing a case), the United States does not deny that it is primarily liable to the tenants." See also footnote 11, page 27, of latest brief.

However, we have read all of the cases cited. None of them is controlling. Nine of them are decisions of trial courts; two citations are the same case in different courts. As conceded by the Government, footnote page 12, certiorari brief, many of the cases arose on apportionment of the total award for the property between the owner and his tenant. Also, in most of the cases the entire fee of the landlord was condemned.

In one case the trial court held (*United States v. Certain Parcels of Land in Loyalsock, Township, etc.*, 51 Fed. Supp. 811) that condemnation was the same as a sale. In *Liggett & M. Tobacco Co. v. United States*, 274 U. S. 215, 71 L. Ed. 1006, supra, this Court held that the requisitioning of the property of Liggett & Meyers was not a sale. "Navy order N-4128 did not purport to be an offer to purchase. It commanded delivery of specified merchandise. Plaintiff's consent was not sought; it was not consulted as to quantity, price, time or place of delivery. The Navy relied upon the compulsory provisions of the Acts of Congress and commanded compliance with the order. * * *

"The findings show that plaintiff's property was taken by eminent domain." * * * (Page 220 of U. S.).

In some of the cases, the tenants had agreed that the fixtures should be the property of the landlord. One case (*U. S. v. Certain Improved Premises*, 54 F. Supp. 469), held that in no event could removal expenses be considered, on the authority of the Gershon case, 284 Fed 489, relied upon by the Government in the Circuit Court in our cases, but not adopted by this Court in the General Motors case.

In another case, *United States v.* 21,815 *Square Feet of Land, etc.*, 59 Fed., Supp. 219, the trial court declared that the tenant was chargeable with knowledge that his property could be condemned as though condemnation were confiscation. Instead of construing the Fifth Amendment liberally to protect the citizen, the court construed it liberally to protect the Government. The court held that the General Motors case did not apply because in the condemnation clause of the lease, it provided that the fixtures belonged to the landlord on condemnation. There is no such provision here.

In some of the cases, for instance *Boston v. Talbot*, 206 Mass. 82, 91 N. E. 1014, the lessors actually terminated the

lease by notice. In the American Cremeries case, 149 Washington, 690, 271 Pac. 896, after condemnation was commenced by the City of Seattle, the landlord agreed what the amount of its award should be. There was a provision in the lease to the plaintiff that its tenancy should terminate upon a sale. The Supreme Court of Washington said, "There is but one question for determination in this case, namely, when the City of Seattle took the property by condemnation proceedings did the transaction amount to a sale of the property within the terms of the lease between respondent and the appellant?" The tenant was also insisting upon recovering a part of the landlord's award. Condemnation is not a sale, and we are seeking no part of the money paid the landlord by the Government.

In *Goodyear Shoe Machinery Company v. Boston Terminal Company*, 176 Mass. 115, 57 N. E. 214, the condemnor was also the landlord and gave notice of the termination of the tenant's lease which was terminable upon condemnation. The question was whether the landlord, being also the condemnor, had not violated the covenant for quiet enjoyment. The court, however, said that the lease gave the lessor the option to terminate on condemnation, and the mere fact that the landlord was also the condemnor did not give the tenant any additional rights.

In our cases, had the proceedings continued to condemnation against the landlord for the same lease as was negotiated, it would require some ingenuity to define what had been condemned. Certainly the fee was not taken nor was the entire property. The landlord gets his building back and eventually will have all of his property left so neither he nor the tenants could insist on the entire value of the property being determined. "Where the owner, after condemnation, retains substantial rights in the property, he cannot insist on their value being included in the measure

of his compensation." *Karlson v. United States,* 82 Fed. (2d) 330, 336. Nor can the tenants be required to wait for their compensation where the landlord gets his month by month. "The value of the leasehold should be fixed as the date of the award. The award cannot be suspended in thin air awaiting the future contingency of when the Government may see fit to occupy its property for the purpose for which it was taken in condemnation. (Or the future contingency of the Government electing to abandon or to continue its lease and monthly rental payments.) * * * He did not contract with the Government and possibly might not choose the United States as an agreeable landlord." *Carlock v. United States,* 53 Fed. (2d), 927, cited and relied upon by the Government. The Carlock case also says: "We are not impressed with the contention of counsel for the Government to the effect that the tenant is not entitled to any consideration or remuneration for the improvements which he placed upon the premises."

When the reason for the insertion of condemnation clauses in leases is considered, the inapplicability of the clause to our case is apparent. Some courts have held that the condemnation of the entire property terminates the lease and all obligations under it, while other courts hold that it does not. (See *Goodyear Shoe Machinery Company v. Boston,* supra.) *City of Pasadena v. Porter,* 201 Calif. 381, 257 Pac. 526; *Foote v. Cincinnati,* 11 Ohio, 408; *Pause v. City of Atlanta,* 98 Ga. 92, 58 Am. St. Rep. 290. Some courts hold that a partial taking does not abrogate the lease and the tenant is bound to continue paying rent. *Corrigan v. City of Chicago,* 144 Illinois 537, 543, 33 N. E. 746; *Stubbings v. Village of Evanston,* 136 Illinois 37, 26 N. E. 577; *Pierson v. H. R. Leonard Furniture Co.,* 268 Michigan 507, 256 N. W. 529. The condemnation provision in leases is designed to eliminate this uncertainty and definitely to define the rights of the tenant as well as of the landlord.

The tenant is relieved of paying any further rent for any of the premises and the whole matter between the landlord and tenant is concluded. The tenant, as a consideration for such a release, agrees not to claim any of the award of the landlord. There is nothing in such a clause that relieves the condemnor of any liability. It is not a party to it, nor was it made for its benefit.

In the case of the Independent Pneumatic Tool Company, its tenancy terminated by the condemnation regardless of anything contained in the lease. It was the tenant's right of occupation that was taken, not the landlord's. The landlord lost nothing. He was not entitled to possession, but only to his rent, which he is receiving now from the Government instead of from the tenant. The tenant is the only one whose property was taken. He was ousted completely, and is seeking nothing from the landlord. The landlord was awarded nothing, is being paid nothing, nor could he receive anything for the property taken from the tenant. The condemnation provision of the lease, being solely for the benefit of the landlord and the tenant, would have no bearing upon the tenant's right to recover for damages peculiarly applicable to him and which in no way diminish the award of the landlord. The condemnation provision was not made for the benefit of the condemnor, and it is difficult to understand how the condemnor may use it as a defense against paying just compensation when it takes property of the tenant that is entirely distinct and separate from that of the landlord. Some of the cases cited by the Government allowed recovery for the tenant's fixtures or for damages thereto. Under the facts and verdict here we submit both lower courts disposed of the Tool Company case properly, particularly since at the trial the Government contended it had no lease (R. 485-487).

In spite of the fact that the Petty Motor Company had a lease the Government objected to evidence on its

behalf (R. 470-471), and has likewise appealed from the judgment in its favor the same as in the other cases. Apparently the Government itself considers the rights of all the tenants to be identical and a written lease no different than any other.

On page 26 the Government cites the case of *United States v. Dunnington*, 146 U. S. 338, as authority for the proposition that the amount which the condemnor must pay cannot be increased by contracts or distribution of ownership of the property among different persons, and its liability is determined as if the property were in a single ownership. If by this the Government means that the value of the separate interests may be disregarded in computing total value, then the *Dunnington* case is not authority for that proposition, nor are any of the others cited on that page. For example, the *Dunnington* case simply said that the Government was not interested on the condemnation of the fee in the distribution of the award to the persons who owned the fee. It was not an increase in the value of the property that was being considered, but the question of proper parties. In *State v. Superior Court*, 80 Wash. 417, 141 Pac. 906, the question of proper parties was also involved. The court also quotes from *Lewis on Eminent Domain* to the effect that it has never been doubted that lessees are entitled to compensation and must be made parties in order to divest their interest, that the duration of the lease is immaterial, and says, "We are satisfied that the object of the law is to save to the owner and those interested the full cash value of the property taken." The same principle was announced in *Silberman v. United States*, 131 Fed. (2d) 715; *Carlock v. United States*, 53 Fed. (2d) 926; *Meadows v. United States*, 144 Fed. (2d) 751; *Kafka v. District Court*, 128 Minn. 432, 151 N. W. 441. In the *Carlock* case the Court said it was not impressed with the contention of the Government that a tenant is not

entitled to consideration or remuneration for improvements which he placed upon the premises. In the *Meadows* case, both the landlord and the tenant offered evidence of the value of their respective rights in the property condemned. There was no attempt made to eliminate the value of the tenant's interest. In the *Kafka* case the Court expressly held that the gross award was ample as to all interests and that any party had a right to appeal.

If by the quotation on page 26 the Government concedes that in determining the value of the interest taken all interests must be considered in fixing the value, then it has no complaint here. It fixed the landlord's value itself, and the jury fixed the tenant's value. There was no overlapping in any instance.

Several of the cases cited on page 26 have nothing to do with the problem before us here. Nor have the cases on page 27, footnote 12, any application under the facts present here.

On pp. 30 and 33 the Government makes the unique argument that the only thing that it has done is to accelerate the removal of the tenants from the premises by a very short period, that by the condemnation it has relieved them of the liability to pay rent or to return to the premises. As well might a bank argue that it has done a borrower no injury by requiring payment of a note before it is due, since it had to be paid eventually anyhow and the borrower is relieved of paying interest and is not indebted any more; or a tortfeasor justify his negligence by saying that the deceased eventually would have died anyway! The short answer is that they didn't have to move at all at the time the Government condemned.

Also, on page 30, the Government apparently argues that the case of *United States v. Chicago B. & Q. R. Co.*, 82

Fed. (2d) 131, certiorari denied 298 U. S. 689, is overruled by the recent case of *United States v. Willow River Co.*, 324 U. S. 499, or if it is not overruled that there is a different rule for railroads than there is for others under the Fifth Amendment. While there may be various methods of determining just compensation, there is no exception so far as we know favoring railroads or any other classes. Always the factor is the same—just compensation. The *Willow River* case, as we read it, instead of overruling the *Chicago B. & Q. R.* case, approves the principles announced in that case. In the *Willow River* case this Court says: "But damage alone gives courts no power to require compensation where there is not an actual taking of property." It would follow that where there is an actual taking of property, damage in connection therewith is recoverable. This principle has been announced by this Court in numerous cases, as we have already indicated. The *Willow River* case simply holds that no one has a right to have a navigable stream remain at a certain level. There was no damage to any of the property of the company, and the company had no right because of its riparian ownership to have the water remain at the ordinary high water level.

The Government cites the case of *United States v. 150.29 Acres of Land*, 148 Fed. (2d) 33, certiorari denied *Eline's Inc. v. Gaylord Container Corp.*, Oct. Term, 1944, Nos. 1302-3 (pp. 24, 41). In that case the Government condemned the entire lease term, and yet evidence of moving costs was admitted and approved.

GOVERNMENT'S ARGUMENT II.

We have discussed heretofore the right of a month-to-month tenant to compensation upon condemnation of his tenancy.

Some of the Government's cases repudiate its former theory that only the landlord need be considered. In three

of the cases (*United States v. Inlots*, 26 Fed. Case No. 15441A, Page 492; *Meadows v. United States*, 144 Fed. (2d), 751, and *Silberman v. United States*, 131 Fed. (2d), 715), all the interests were considered together in fixing total values, and though the tenant was not heard in the Silberman case, he was in each of the other cases, and his values were fixed separate and apart from the landlord's. This is contrary to the Government's contention below and now apparently abandoned here, that the landlord's estate must be apportioned among the tenants. The holding as above indicated in the Inlots case was approved by this Court on appeal in *Kohl v. United States*, supra.

The Government informs us that the questions presented are of large importance to the Government in its acquisition and use of property for war purposes; calls attention of this Court to the fact that the temporary use of a large number of buildings has been taken, and obliquely insinuates that allowing compensation in our cases would be dangerous and expensive because application of the view of the court below would produce similar results in numerous other cases. In the Circuit Court, the Government was more direct. It came right out and said that, "The resulting increase in the costliness of military acquisitions staggers the imagination." This is but another way of saying that because the property is needed for war purposes, the Fifth Amendment should be disregarded, as otherwise the costs would be staggering. This Court has already answered that argument as has Congress itself in the Act under which these proceedings were brought.

"The war or the conditions which followed it did not suspend or affect these provisions." (Fifth Amendment). *United States v. New River Collieries*, supra. Congress gave the Government the right to pursue such remedy as it might elect, "by purchase, donation, or other means of transfer," or "to acquire by condemnation." And as we

have shown, when the Government elects to proceed by condemnation, it not only is foreclosed to deny that the property condemned has a value, but it knows, as did Congress, that this Court has held that the right of eminent domain is inseparably connected with the obligation to pay just compensation. The Government originated these proceedings. It chose the method it would follow. It selected its remedy. We had nothing to do with it. If the Government chose to go around the country evicting people under the power of condemnation, it having selected that method of procedure, knew it would be required, and must be held to pay just compensation. It has at no time made any effort to negotiate with us or to consult us. All of this costly litigation could have been avoided by simple negotiation and no time would have been lost either in occupying our property or in consuming the time of three separate courts. We did not choose route we have traveled. It was forced upon us by the Government. It is no plea that the exigencies of war required the procedure adopted herein. Nor is it any plea that it is unjust to allow us the meager $10,000.00 we were allowed. The Government didn't proceed to occupy our property for war purposes forthwith. It spent several months in wrecking the interior of the building at an expenditure of ten times more than the jury allowed us, and then abandoned the whole enterprise for the purpose it was condemned. Neither the war nor any requirements thereof compelled the Government to take the course it followed in our cases. The Government should be required to recognize that in war as in peace it should know in advance where it is going and why it is proceeding, and if the necessities of war required confiscation of property, then, as this Court has said, this country does not require one citizen to suffer in order that the entire public may gain by his loss. Under our Constitution the individual loss is

distributed among all the people and is another one of the burdens of war.

In line with the Government's argument that the tremendous costs of war should relieve it of paying for this property, the Government would be justified in confiscating the product of an ammunition plant, an airplane factory, or any other property needed in war. Certainly it could not be heard to say here or any place else that it would be excused from paying because, "The questions presented are of large importance to the Government in its acquisition and use of property for war purposes."

Representatives of the United States must recognize and realize that they do not possess the power of confiscation, and that in acting as representatives of the Government they are not above the Constitution. More than sixty years ago this Court declared, "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, 182.

In answering the attempt there as here to confiscate the property of private citizens without compensation, this Court said, "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other Government which has a just claim to well-regulated liberty and the protection of personal rights."

CONCLUSION

No rule for the determining of "just compensation" was violated herein. The verdicts of the jury are less than they should have been and do not include items to which the Government objected. The court's instructions favored the

Government. No substantial rights of the Government have been affected by the judgments herein, nor is it in any position to complain here. Our private property was taken for public use by the United States under the power of eminent domain. Having chosen to proceed against us under the power of eminent domain, the Government cannot escape liability by contending that there was no taking or that what it took under that power was not property. The very fact that the Government used the power of eminent domain establishes that there was a taking and that what it took was property. For this property just compensation must be paid. The Government has not shown wherein any verdict is unfair as a matter of "justice and equity." The cases should be affirmed.

Respectfully submitted,

SHIRLEY P. JONES,
BENJAMIN L. RICH,
GORDON R. STRONG,
Boston Building
Salt Lake City, Utah

CHARLES D. MOORE,
Felt Building
Salt Lake City, Utah

Attorneys for Respondents.